Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

LUCENT TECHNOLOGIES INC.,

Petitioner,

v.

AARON FELIX, SR., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a former employee has standing to sue as a benefit plan "participant" under Section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a), and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), when he claims that, "but for" his employer's alleged wrongful acts, he would have been entitled to receive more generous benefits under amendments to his existing pension plan that were adopted after his retirement.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT

The petitioner in this case is Lucent Technologies Inc. Petitioner was the defendant in the District Court and the appellee in the Court of Appeals.

Respondents Aaron Felix, Sr., et al. are 463 former Lucent employees who are participants in Lucent's defined benefit pension plan.

There were no other parties in the Court of Appeals.

Petitioner Lucent Technologies Inc., whose stock is publicly traded, has no parent company, nor does any publicly held company own 10% or more of Lucent's stock.

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Petitioner Lucent Technologies Inc. hereby petitions this Court to grant a writ of certiorari to review the decision below of the United States Court of Appeals for the Tenth Circuit. Resting its holding on "technical entitlement" to benefits under a plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a), the Tenth Circuit held that a former employee who claims to have been defrauded with respect to early retirement amendments to an employee pension benefit plan does not have standing to sue under ERISA because the former employee is not a "participant" of the amended plan for purposes of ERISA § 502(a). The Tenth Circuit acknowledges that its decision, along with those from the Fourth and Eleventh Circuits, squarely conflict with decisions of five (actually seven) other Circuits which hold that a former employee who would be a participant "but for" the alleged wrongful acts of his employer has standing to sue under ERISA.

This Court should grant certiorari to resolve the circuit split on this critical and fully developed question, which is central to the proper administration and protection of employee benefit plans. There is a clear need for nationwide uniformity of law concerning ERISA participant standing to sue. Many plans, including those administered by Lucent, have nationwide applicability. Employee benefit plans should not be subject to one set of enforcement policies in the Tenth, Fourth and Eleventh Circuits — which invite applications of state law to employee benefit plans — and another for the rest of the country. Nor should employees' and retirees' ERISA rights be foreclosed by the unavailability of an ERISA claim and the preemption of state-law theories of recovery based on the fortuity of geography or available venues (*see* ERISA § 502(e), 29 U.S.C. § 1132(e)). With a definitive ruling on the scope of participant status and

standing, and elimination of the conflict presented in this case, this Court can strengthen the enforcement of ERISA, promote the enforcement of claims by participants, and protect ERISA benefit plans from unwarranted inroads by state substantive law and damages claims.

OPINIONS BELOW

The opinion of the Court of Appeals, set forth at App. 1a-43a, is reported at 387 F.3d 1146 (10th Cir. 2004). The memorandum decision of the District Court, set forth at App. 44a-48a, is not reported.

JURISDICTION

Lucent contended that the District Court had federal question jurisdiction under 28 U.S.C. § 1331 because respondents' purported state-law fraud claims, which Lucent removed to federal court, "arose under" and were "completely preempted" by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, and the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Certiorari is not sought with respect to the Tenth Circuit's ruling that the LMRA did not provide a basis for federal jurisdiction. The judgment of the Court of Appeals was entered on October 26, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3(7) of ERISA, 29 U.S.C. § 1002(7), provides in relevant part:

> The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

Section 502(a) of ERISA, 29 U.S.C.§ 1132(a), provides in relevant part:

> (a) Persons empowered to bring a civil action. A civil action may be brought
>
> (1) by a participant or beneficiary —
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

STATEMENT OF THE CASE

A. Plan Participants And ERISA's Grant Of Authority For Participants To Sue.

A fundamental purpose of ERISA is to provide civil enforcement remedies to plan participants, beneficiaries and fiduciaries with respect to employee benefit plans. ERISA Section 3(7), 29 U.S.C. § 1002(7), defines "participant" as an "employee or former employee of an employer ... who is or may become eligible to receive a benefit of any type from an employee benefit plan ..." This Court has explained that participants include "employees in, or reasonably expected to be in, currently covered employment" and "former employees who have ... a reasonable expectation of returning to covered employment or who have a colorable claim to vested benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989).

ERISA provides "a panoply of remedial devices" for participants and beneficiaries of benefit plans. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).[1]

1. In ERISA, Congress enacted a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).

These include ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which provides a participant or beneficiary a civil action "to recover benefits due him under the terms of the plan, or to clarify his right to future benefits under the terms of the plan." ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), similarly provides that participants, beneficiaries and fiduciaries may sue "to enjoin" acts or practices violating ERISA or the plan, or to obtain "other appropriate equitable relief" to "redress" violations or to "enforce" ERISA or the plan.

B. This Court's ERISA Complete Preemption Rulings.

This Court has issued various ERISA preemption rulings through the years, including that state-law claims are "completely preempted" by ERISA when they arise under ERISA § 502(a)(1)(B) — making them removable to federal court. As the Court recently stated in *Aetna Health Inc. v. Davila*, __ U.S. __, 124 S. Ct. 2488, 2496 (2004), "if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted by ERISA § 502(a)(1)(B)."

The preemptive force of ERISA § 502(a) is so "extraordinary" that it converts a state claim into a federal claim for purposes of removal and the well-pleaded complaint rule. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("The policy choices reflected in the inclusion of certain remedies and the exclusion of others under [ERISA § 502(a)] would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA."). The Tenth Circuit in this

case concluded that, if respondents' claims had arisen under Section 502(a), they would have been removable and completely preempted. App. 24a.

C. The Facts.

Respondents Felix, *et al.* are 463 former employees of Lucent's Oklahoma City, Oklahoma manufacturing facility known as the Oklahoma City Works ("OKCW"). App. 49a (Fourth Amended Petition ("FAP") ¶¶ 1-2). On February 19, 2001, Lucent and respondents' union, the International Brotherhood of Electrical Workers ("IBEW"), collectively bargained a Memorandum of Agreement (the "MOA") addressing the effects of Lucent's decision to outsource work previously performed by IBEW-represented employees and settling unfair labor practice charges that the IBEW had filed with the National Labor Relations Board against Lucent in connection with Lucent's outsourcing decision. App. 50a-51a (FAP ¶ 5).

The February 19, 2001 MOA amended the Lucent Technologies Inc. Pension Plan ("LTPP") and various other benefit plans (retiree medical, dental, and life insurance). App. 55a-82a. The benefit plan amendments provided each participant with enhanced service to accelerate pension and retiree health eligibility, an enhanced Social Security supplement, a "Special Pension Benefit" (based on a formula of annual pay and layoff allowances), a "Special One Time Lump Sum Transition Payment" of $11,000, extended medical, dental, and life insurance coverage, and immediate vesting in Lucent's defined contribution 401(k) plan (the Long-Term Savings and Security Plan). App. 50a-51a (FAP ¶ 5), 55a-82a (MOA), 83a-97a (LTPP Amendment).

The benefits negotiated through the MOA were offered in June 2001 to IBEW-represented employees at the OKCW, including respondents. App. 50a-52a (FAP ¶¶ 5, 9). Respondents allege that Lucent and IBEW representatives stated to them that the offer was a "one-time, non-negotiable, final offer that was a take-it-or-leave-it proposal," that "any delay by any employee in accepting the offer would not result in any additional benefit[s]" to them, and that these statements were "intentional[] misrepresent[ations]." App. 51a-53a (FAP ¶¶ 7-9, 13). Respondents contend that Lucent knew when it made these assertions that even greater benefits would be offered to OKCW employees who remained on the payroll after respondents retired. App. 52a-53a (FAP ¶¶ 11, 13). Specifically, respondents claim that Lucent knew (but did not disclose) in June 2001 that the same benefits respondents accepted *plus* an additional $15,000 "special one-time pension benefit" would be made available to employees who remained on the payroll through October 2001. App. 52a-53a (FAP ¶¶ 11, 13). All 463 respondents accepted the June offer and its benefits, and retired from Lucent on June 30, 2001 based on Lucent's alleged misrepresentations that no better benefits would be forthcoming. App. 52a (FAP ¶ 9). By retiring pursuant to the June offer, many respondents became immediately eligible to commence pension payments under the LTPP (and in fact did). App. 60a-68a, 83a, 90a-95a.

After respondents retired, Lucent and the IBEW negotiated an additional $15,000 "special one-time pension benefit." App. 52a (FAP ¶ 11); *see* App. 85a (providing for a "special, one-time enhanced pension benefit"), 91a-95a, 99a. The additional pension benefit was memorialized in a September 24, 2001 Letter of Agreement ("LOA"), which provided in relevant part:

> This letter will confirm our agreement to amend the Lucent Technologies Inc. Pension Plan (the "Pension

> Plan") to provide a one-time pension benefit, payable in a lump sum or an annuity, to those EM-3 represented employees in the Columbus and Oklahoma City facilities whose employment is affected by the transition of these facilities from Lucent to Celestica. The Company has agreed to amend the Pension Plan to provide a one-time lump-sum pension payment of $15,000 (or its annuity equivalent) for each EM-3 represented employee who terminates employment at Lucent, during the period starting September 1, 2001 and ending upon the completion of the outsourcing of work from Lucent to Celestica.

App. 102a-103a. The LTPP was subsequently amended accordingly. App. 84a-85a, 98a-101a.

D. The Proceedings Below.

On February 12, 2002, respondents filed their Fourth Amended Petition in Oklahoma state court. App. 49a-54a. According to the FAP, in June 2001, in reliance on alleged misrepresentations by Lucent, respondents all accepted the June 30, 2001 voluntary early retirement package. App. 50a-53a (FAP ¶¶ 5, 7-9, 13-14). According to respondents, had they not been tricked into accepting the voluntary retirement package offered to them, they would have remained on Lucent's payroll and accepted the later package that offered the same benefits they received plus the additional $15,000 "special one-time pension benefit." App. 52a-53a (FAP ¶¶ 11, 13-15). As relief, they sought "damages suffered by each [respondent] in a lost 'special one-time pension benefit' in the amount of $15,000," plus "damages suffered by those [respondents] who lost an additional year of service when

they were induced to retire effective June 30, 2001," and "punitive damages in an amount which both punishes the defendant and makes it an example to other similarly-situated companies." App. 54a (FAP Prayer for Relief ¶¶ 1-3).

Lucent timely removed the case to the United States District Court for the Western District of Oklahoma on the grounds that respondents' claims were preempted by ERISA and the LMRA. Lucent thereafter moved to dismiss the FAP based on ERISA and LMRA preemption, and respondents moved to remand to state court. Lucent argued that, if respondents had any claim at all, it was one for benefits under ERISA § 502(a)(1)(B). Lucent asserted that respondents' state-law fraud claim fell squarely within the scope of Section 502(a)(1)(B), which provides that a civil action may be brought by a plan participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his right to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

On March 17, 2003, the District Court entered an order denying respondents' motion to remand and granting Lucent's motion to dismiss plaintiffs' claims as preempted by ERISA. App. 44a-48a. The District Court determined that respondents' state court petition:

> reveals that the fraud claim relates to Lucent's alleged denial of additional employee benefits in the form of the "special one-time pension benefit" and the reinstatement of an additional year of service for some employees for purposes of calculating the amount of the respective pension[s] over the life of each pension. Plaintiffs'

> attempt to label these items as merely "damages" completely overlooks the fact that these items clearly relate to and are derived from Lucent's employee benefit plan.

App. 47a. The District Court reasoned that respondents' claim that "but for" Lucent's alleged fraudulent statements they would not have retired when they did necessarily involved a claim for benefits under an employee benefit plan, and dismissed the claim as preempted by ERISA. App. 47a-48a.

On appeal, the Tenth Circuit reversed. That Court first distinguished this Court's complete and conflict preemption decisions under ERISA §§ 502 and 514, 29 U.S.C. §§ 1132 & 1144. App. 14a-24a. Under these authorities, conflict preemption of a state-law claim alone is not sufficient to support removal. App. 19a-24a. On the other hand, when the state-law claim falls within the scope of Section 502(a), the claim is removable to federal court under the complete preemption doctrine of *Taylor* and *Davila*. App. 17a-18a, 20a. The Tenth Circuit ultimately concluded that removal was improper because respondents did not have standing to bring their fraud claim under Section 502(a). App. 24a-26a, 32a-33a. According to the Tenth Circuit, their claim was not one for benefits due to them under a benefit plan, but for damages. App. 33a.

Addressing an argument and authorities not raised by respondents, the appellate court construed ERISA § 3(7) and this Court's decision in *Firestone*. App. 24a-26a. The Tenth Circuit held that, under *Firestone*, "a former employee with no reasonable expectation of returning to covered employment must have a 'colorable claim to vested benefits'

under the plan" in order to maintain a claim under ERISA Section 502(a). App. 25a (citations omitted). In the Tenth Circuit's view, respondents were not seeking clarification of "'[their] rights to future benefits under the terms of the plan'" (brackets in original) and did not have standing to seek relief through ERISA § 502(a). App. 26a (citation omitted). Rather, respondents were claiming that they had been "fraudulently induced to take early retirement, to their financial detriment; they seek monetary damages from their employer (not from the pension plan) for that alleged fraud." App. 26a. Although the "one-time lump sum pension payment of $15,000" paid under the later LTPP amendments was specifically denominated as an "Additional Pension Enhancement for Certain IBEW Employees Affected by Celistica Subcontracting/Outsourcing" in the plan documents (App. 98a), the Court did not consider theirs to be a claim "'to recover benefits due to [them] under the terms of [their] plan.'" App. 26a (citation omitted; brackets in original). The Court held that respondents' claim "therefore falls outside the scope of 29 U.S.C. § 1132(a)(1)." App. 26a.

The Tenth Circuit further rejected Lucent's argument (embraced by the District Court (App. 47a-48a)) that Section 502(a) nevertheless controlled the outcome of the case because respondents were contending that "but for" Lucent's alleged wrongful actions they would have been entitled to the additional "special one-time pension benefit" under the subsequently-amended plan. App. 26a. The Court acknowledged that "[t]he circuits are split over whether plaintiffs have standing to sue under ERISA in such a case. Although the First, Second, Fifth, Sixth and Eighth Circuits have held that former employees may sue under ERISA if

they make a 'but for' claim of this sort,[2] we, along with the Fourth and Eleventh Circuits, have rejected this approach." App. 26a-27a (collecting cases).

According to the Tenth Circuit, "[t]he 'but for' circuits mistakenly assume that our jurisdiction depends only on the traditional notion of standing .. . [The standing] requirement of § 502 is 'both a standing and a subject matter jurisdictional requirement.'" App. 29a, n.14 (quoting *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434 (4th Cir. 1986)).

> [T]here is no controlling case law or statutory language to support such a "but for" exception to ERISA standing where the plaintiff is not *technically entitled* to the additional benefit under the pension plan[.] [W]e decline[] to create an exception to *Firestone* and reject[] the availability of any "but for" test.

App. 28a-29a (emphasis added). Earlier, in *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528 (10th Cir. 1993), the Tenth Circuit had stated:

> To say that but for Mobil's conduct, plaintiffs would have standing is to admit that they lack standing and to allow those who merely claim to be participants to be deemed as such . . . The existence of fraud is irrelevant to the linchpin

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2. The Court cited to *Adamson v. Armco, Inc.*, 44 F.3d 650, 654-55 (8th Cir. 1995); *Swinney v. Gen. Motors Corp.*, 46 F.3d 512, 518-19 (6th Cir. 1995); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 667-68 (2d Cir. 1994); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 702-03 (1st Cir. 1994); and *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1220-21 (5th Cir. 1992). App. 26a-27a, n.11.

> of our *Mitchell* holding -- the receipt of all benefits to which the employee is entitled under the plan [deprives him standing to sue under an amended plan].

Id. at 1536 (citation omitted). *See also Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir. 1990) ("These claimants seek a damage award, not vested benefits improperly withheld . . . The fact that an employee takes his lump sum under protest does not preserve his standing as long as an employer pays out all the vested benefits owed to the employee") (citations omitted). "In sum, we have rejected a 'but for' test for determining standing to sue under ERISA." App. 30a.

Thus, the Tenth Circuit concluded that respondents were not "participants" so as to bring their fraud claim within the reach of ERISA § 502(a)(1). App. 35a. For this reason, the Court held that the District Court had erred in finding complete preemption. *Id.*

REASONS FOR GRANTING THE PETITION

A. The Tenth Circuit's Decision Conflicts With The Decisions Of Seven Other Courts Of Appeals On A Critical And Fully-Developed Issue Of Statutory Interpretation.

The split among the circuits is even more pronounced than the Tenth Circuit identified. The Tenth Circuit's rule is firmly established in that Circuit, and two other Circuits (the Fourth and the Eleventh) have also rejected the "but for" test for ERISA standing. App. 26a-27a; *see Sanson v. General Motors Corp.*, 966 F.2d 618, 620-23 (11th Cir. 1992); *Stanton*, 792 F.2d at 434-35. On the other hand, seven Circuits

have explicitly *adopted* the "but for" test for ERISA standing (under which respondents' claims would have been dismissed as completely preempted). Of those, most specifically disagree with the Tenth Circuit's reasoning and analysis:

- First Circuit: *Vartanian v. Monsanto Co.*, 14 F.3d 697, 702-03 (1st Cir. 1994) (disagreeing with Tenth Circuit, and holding that a former employee who claims that he would not have retired "but for" employer's alleged misrepresentations that a more lucrative benefit plan was not under serious consideration has standing to sue under ERISA).

- Second Circuit: *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 667-68 (2nd Cir. 1994) (disagreeing with Tenth and Fourth Circuits, and agreeing with First and Fifth Circuits that former employee has standing to sue under ERISA § 502(a) on a claim that he would have been eligible for benefits under a subsequently-amended plan "but for" employer's fraudulent misrepresentations).

- Fifth Circuit: *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221-23 (5th Cir. 1992) (disagreeing with Tenth Circuit and holding that if, "but for the employer's conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits, . . . the employer should not be able through its own malfeasance to defeat the employee's standing . . . [Plaintiffs] allege deceptive conduct by Mobil that might be found to vitiate the voluntariness of their decision to retire") (emphasis in original).

- Sixth Circuit: *Swinney v. General Motors Corp.*, 46 F.3d 512, 518-19 (6th Cir. 1995) (rejecting minority position of Tenth and Fourth Circuits as "read[ing ERISA] § 1002(7) and the Supreme Court's decision in *Firestone* too strictly," and following majority position of First, Second and Fifth Circuits that "so long as a former employee would have been in a class eligible to become a member of the plan but for the fiduciary's alleged breach of duty, he 'may become eligible' for benefits under the plan, and is therefore a 'participant' under [ERISA] §1002(7) for the purposes of standing"); *Astor v. IBM*, 7 F.3d 533, 538 (6th Cir. 1993) ("under both ERISA and traditional concepts of standing, [such plaintiffs have] sufficient personal stake in the outcome of a justiciable controversy to obtain a judicial resolution of their dispute .. . They are within the zone of interests ERISA was intended to protect").

- Seventh Circuit: *Panaras v. Liquid Carbonic Industries Corp., et al*, 74 F.3d 786, 791 (7th Cir. 1996) (following *Firestone* and applying "but for" test from First and Fifth Circuits to hold that "standing is available to any former employee who has a colorable claim to benefits which the employer promised to provide pursuant to the employment relationship and which a nonfrivolous argument suggests have accrued to the employee's benefit").

- Eighth Circuit: *Adamson v. Armco, Inc.*, 44 F.3d 650, 654-55 (8th Cir. 1995) (court acknowledges that Eighth Circuit has adopted majority "but for" approach under which former employees may be plan participants if they have lost participant status

because of employer's misconduct; rejecting Tenth Circuit's rule); *Howe v. Varity Corp.*, 36 F.3d 746, 748 (8th Cir 1994) (recognizing claim by former employees who contend that employer fraudulently misrepresented benefit security at subsidiary to which they transferred), *aff'd, Varity Corp. v. Howe*, 516 U.S. 489, 491 (1996) (affirming claim of beneficiaries of a benefit plan who contended that their employer, through trickery, led them to withdraw from the plan and to forfeit their benefits).

- Ninth Circuit: *McBride v. PLM Int'l, Inc.*, 179 F.3d 737, 742-44 (9th Cir. 1999) (rejecting view that former employee is not a plan "participant" and lacks standing to sue if he has received full distributions of vested benefits; court follows Fifth Circuit's "but for" rule to find participant status and holds that participant status must be adjudged at the time of the alleged violation).

As explained below, the First, Second, Fifth, Sixth, Seventh, Eighth and Ninth Circuits are right,[3] and the Tenth, Fourth and Eleventh Circuits are wrong. Moreover, there is no reason to believe that this Court would benefit from

3. The Third Circuit is also likely in the majority camp. *See Miller v. Rite Aid Corp.*, 334 F.3d 335, 340-44 (3d Cir. 2003) (court has no occasion to consider "but for" test in absence of claims of employer wrongdoing, but thoroughly discusses standing issues under *Firestone* and cites with approval First and Fifth Circuit authorities adopting "but for" standing); *Fischer v. Philadelphia Elec. Co.*, Case No. 90-8020, 1991 WL 36215, at **3-5 (E.D. Pa. March 15, 1991) (employees "tricked into retiring" have ERISA standing because they would have been plan members "but for [their employer's] selective divulgence of [plan] information"), *rev'd on other grounds*, 994 F.2d 130, 136 (3d Cir. 1993).

deferring review in order to allow additional litigation to further develop the issue presented. The considerations addressed by the Tenth Circuit in its decisions – the statutory definition of "participant" and *Firestone*, constitutional and prudential limitations on standing, this Court's decision in *Ingersoll-Rand v. McClendon* and the legislative history – are the identical considerations that have been extensively addressed in the other decisions coming to conclusions irreconcilable with the Tenth Circuit's position.

Statutory Language and Firestone Tire & Rubber v. Bruch. In ERISA § 3(7), Congress defined "participant" as:

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7).

In *Firestone*, this Court rejected the Third Circuit's view that the definition of "participant" in Section 3(7) includes "*someone who claims to be* a participant or beneficiary." 489 U.S. at 117 (emphasis in original). Finding that such a construction "strays far from the statutory language," the Court held that a "'participant' is naturally read to mean either 'employees in, or reasonably expected to be in, currently covered employment, or former employees who 'have ... a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Id.* (citations omitted). To establish that he "may become

eligible," a claimant must have a "colorable claim" that "(1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.*[4]

Based on its reading of ERISA § 3(7)'s language, *Firestone*, and prior Tenth Circuit precedent, the Tenth Circuit held that respondents in this case lacked standing to pursue claims under ERISA § 502(a)(1) because they were not "technically entitled" to benefits under Lucent's amended LTPP. App. 28a-30a, 32a-33a. The Tenth Circuit reasoned that respondents were not seeking to recover benefits due "under the terms of [their] plan, to enforce [their] rights under the terms of the plan, or to clarify [their] rights to future benefits under the terms of the plan," but instead were "former employees" seeking damages. App. 26a (paraphrasing Section 502(a)(1)), 32a. Because respondents were not seeking reinstatement, the Court found that they did not "have a reasonable expectation of returning to covered employment." App. 32a. The Court further found participant status and a "colorable claim" lacking because respondents "do not claim that they are entitled to benefits under the terms of their plan *as it existed at the time of their retirement.* Rather, they claim that they should receive damages . . . because they *would have been* participants under that package but for Defendant's misrepresentations." App. 32a (first emphasis added; second emphasis in original). *See also Raymond*, 983 F.2d at 1536 ("The existence of fraud is irrelevant to the linchpin of our *Mitchell* holding -- the receipt of all benefits to which the employee is entitled under the

4. The Court largely adopted the analysis of the Ninth Circuit in *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986), a case in which the retiree-plaintiff had received all benefits due under the plan but in which the plaintiff sought damages for non-disclosure and breaches of fiduciary duty. *See Firestone*, 489 U.S. at 117.

plan [deprives him standing to sue for benefits under an amended plan]"); *accord Sanson*, 966 F.2d at 620-21; *Stanton*, 792 F.2d at 434-35.

What the Tenth Circuit's holding overlooks is that its "technical entitlement" rule means that ERISA standing can be defeated by acts that plainly constitute violations of ERISA:

> To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense is not to act "solely in the interest of the participants and beneficiaries." As other courts have held, lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA.

Varity Corp. v. Howe, 516 U.S. 489, 506 (1996) (quoting 29 U.S.C. § 1104(a)(1)).

In other words, the Tenth Circuit's rule "has the anomalous effect of allowing a fiduciary 'through its malfeasance to defeat the employee's standing.'" *Mullins*, 23 F.3d at 668 (quoting *Christopher*, 950 F.2d at 1221). As the First Circuit put it in *Vartanian:*

> [W]here an employee alleges a decision to retire based on alleged misrepresentations by his employer amounting to a breach of fiduciary duty, and the true facts are not available to the employee until after the employee has received all his vested benefits under a plan; and further, where the employee shows that in the absence of the

> employer's breach of fiduciary duty he would have been entitled to greater benefits than those which he received, then his receipt of payment cannot be used to deprive him of "participant" status and hence, [he has] standing to sue under ERISA . . . even though he has already received his benefits under the [plan in force before he retired].

14 F.3d at 703. *Accord Swinney*, 46 F.3d at 518-19 ("while the Supreme Court's definition of 'participant' in *Firestone* guides our standing analysis, it is not necessarily dispositive"); *see also McBride*, 179 F.3d at 743; *Panaras*, 74 F.3d at 791; *Adamson*, 44 F.3d at 654-55; *Howe*, 36 F.3d at 754-55; *Astor*, 7 F.3d at 538.[5]

Constitutional and Prudential Limitations on Standing. As the Tenth Circuit recognized, the requirement that an ERISA plaintiff be a plan participant or beneficiary is "both a standing and a subject matter jurisdictional requirement." App. 29a, n.14. *See also Miller v. Rite Aid Corp.*, 334 F.3d 335, 340 (3d Cir. 2003). The "question of standing 'involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise.'" *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "Prudential standing is satisfied when the injury asserted by a plaintiff 'arguably falls within the zone of interests to be protected or regulated by the statute in question.'" *Federal Election Commission v. Akins*, 524 U.S. 11, 20 (1998).

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5. Because many of the 463 respondents are currently receiving pension payments under the LTPP, the Tenth Circuit's decision creates the additional anomaly that respondents can be "participants" under ERISA for some purposes under the plan, *e.g.*, receiving ongoing benefits, but not others, *e.g.*, being covered by plan amendments.

The Tenth Circuit's "technical entitlement" rule stands in marked contrast to the approach of other appellate courts, which, for purposes of standing, assess "the definition [of 'participant'] found in 29 U.S.C. § 1002(7) ... in the context of traditional concepts of standing ... *The ultimate question is whether the plaintiff is within the zone of interests ERISA was intended to protect*." *Vartanian*, 14 F.3d at 701 (emphasis in original); *accord Miller*, 334 F.3d at 341; *Mullins*, 23 F.3d at 668; *Astor*, 7 F.3d at 538; *Christopher*, 950 F.2d at 1221. *Cf. National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 491 (1998) ("although the 'zone of interests' test 'denies a right of review if the plaintiff's interests are marginally related to or inconsistent with the purposes implicit in the statute,' 'there need be no indication of congressional purpose to benefit the would-be plaintiff'") (citations omitted). In other words, whether or not the claim raised by a plaintiff is technically actionable, under a "zone of interest" analysis the plaintiff has standing to make the claim.

The Ingersoll-Rand v. McClendon Decision. The lower courts have also thoroughly debated the significance, in relation to the instant question, of this Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). In *McClendon*, this Court determined that ERISA § 510, 29 U.S.C. § 1140, preempted any state law cause of action for wrongful termination to prevent vesting of benefits. Yet, the Tenth Circuit (in *Raymond*) determined that a claim by a former employee that he had been defrauded of improved benefits was better understood as a state-law wrongful discharge claim with a damages component insufficient to confer ERISA standing. 983 F.2d at 1538, n.14. *McClendon*, the Tenth Circuit said, was distinguishable because it was based on the employer's specific purpose to prevent vesting altogether. *Id.*

The Fifth Circuit in *Christopher* saw things differently. That court reasoned that the

> implication of the Court's holding [in *McClendon*] that the discharged employee must look solely to ERISA for his remedy is that he would have standing to do so . . . [even though under the Tenth Circuit's view] he would be a former employee lacking both a claim for vested benefits and (unless he requested reinstatement) a reasonable expectation of returning to covered employment.

950 F.2d at 1221.[6] *See also Swinney*, 46 F.3d at 519; *Vartanian*, 14 F.3d at 700.

Legislative History. In arriving at different conclusions, the courts of appeals have also thoroughly analyzed the pertinent legislative history. The Tenth Circuit (in *Mitchell*) addressed the various committee reports explaining ERISA's broad remedial purposes, but rejected standing because the same legislative history limits the potential group of claimants to "participants" and "beneficiaries." 896 F.2d at 473-74 & nn.5 & 6. The courts recognizing the "but for" test for standing, in contrast, have found this same legislative history to militate against any result which could deny standing to bring an ERISA claim and nonetheless place the claimant in danger of having his state-law claims preempted by ERISA despite his inability to sue under that statute. *Swinney*, 46 F.3d at 519; *Mullins*, 23 F.3d at 668; *Vartanian*,

6. "[T]he standing question and the merits of an employee's claim are unavoidably intertwined to some degree; whether a plaintiff has standing to assert ERISA rights may depend upon whether he can establish a discharge or some other conduct in violation of ERISA, but for which he would have standing." *Christopher*, 950 F.2d at 1222.

14 F.3d at 702. *See also* App. 24a (here the district court's "finding [that respondents' claims are preempted by ERISA Section 514(a), 29 U.S.C. § 1144(a)] may be correct," but they are not removable because they are not completely preempted by Section 502(a)).

* * *

In sum, the circuit split in the present action reflects fully-developed positions and counter-positions on a key issue of statutory interpretation. The Court should grant certiorari to resolve this important disagreement among the circuits.

B. The Question Presented Raises An Important Question Of Federal Law That Has Not Been Addressed By This Court And Is Of The Utmost Importance To The Administration Of Employee Benefit Plans And The Uniform Application Of Federal Law To Those Plans.

As demonstrated above, the question presented here has been extensively litigated, reflecting its great and continuing importance to the administration of employee benefit plans throughout the nation. Review of the Tenth Circuit's decision and rule is of utmost national importance because its rule produces results that not only make no sense under ERISA but also undermine important ERISA policies.

1. As set forth above, under the Tenth Circuit's "technical entitlement" rule, wrongdoers can prevent standing through misrepresentations to employees. Consequently, claimants may be left without a remedy if ERISA is found (as the Tenth Circuit recognized here) to preempt state-law causes of action despite the claimants' lack of standing to bring an ERISA claim. *See* App. 33a-34a.

2. The Tenth Circuit's technical limitation on standing to sue under ERISA will also expose plans to unwarranted inroads by state-law causes of action and remedies that threaten to balkanize, needlessly disrupt and complicate the uniform regime envisaged by Congress in this "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). Indeed, a fundamental purpose of ERISA is "eliminating the threat of conflicting and inconsistent state and local regulation." 120 CONG. REC. 29197 (statement of Rep. Dent). *See also Davila*, 124 S. Ct. at 2495 ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans."); *Egelhoff v. Egelhoff*, 532 U.S. 141, 149-50 (2001) ("Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators -- burdens ultimately borne by the beneficiaries.") (*citing McClendon*, 493 U.S. at 142).

Moreover, this Court has explained that under ERISA's "uniform regulatory regime," the civil enforcement mechanisms of ERISA § 502(a) are exclusive of those provided under state law: "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under [§ 502(a) of ERISA] would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Pilot Life Ins. Co.*, 481 U.S. at 54. "Nor can the mere fact that the state cause of action attempts to authorize remedies beyond those authorized by ERISA § 502(a) put the cause of action outside the scope of the ERISA civil enforcement mechanism." *Davila*, 124 S. Ct. at 2499.

Yet, despite these controlling rules and policies, the Tenth Circuit's "technical entitlement" rule could expose benefit plans and employers to state-law theories of recovery for punitive damages *not* available under ERISA, where a court (as here) accepts a party's characterization of a "special one-time pension benefit" as a "damages" claim. App 33a.

The relief available for benefits disputes should depend not on a party's nomenclature but rather only on what ERISA provides, and that is why an artificially narrow view of standing that provides no relief (because the state-law claim is preempted) or different relief (because the state-law claim is permitted to proceed) is so destructive of ERISA policies.[7]

3. By rejecting standing for former employees whose status was allegedly procured through trickery and fraud, the Tenth Circuit's decision not only precludes relief consistent with the participants' loss and the framework of ERISA, but invites myriad other arguments by parties to benefits litigation that pose a central assault on core ERISA concepts. Respondents' arguments in this case illustrate the point.

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7. Relief available for ERISA § 502(a) cases includes recovery of benefits due and "other appropriate equitable relief." *See Great-West Life and Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) ("appropriate equitable relief" includes constructive trusts and equitable liens as available remedies); *Harris Trust v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-51 (2000) ("appropriate equitable relief" includes constructive trusts and other forms of restitution as available remedies); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) (rejecting claim for consequential damages for actuarial miscalculations). *See also* ERISA § 409, 29 U.S.C. § 1109 (providing damages relief for fiduciary violations).

Notwithstanding the Tenth Circuit's decision, respondents never argued that they (or any plaintiff) lacked standing under ERISA to remedy alleged fraudulent representations in connection with an employee benefit plan. Instead, respondents sought to avoid ERISA and its damages limitations by contending that state law could be invoked because, in this case, the LTPP, as amended, *was not an ERISA-covered plan at all.* According to respondents, principles concerning benefit plan enforcement and preemption of state-law claims and remedies should not apply because Lucent's amendment of the LTPP to provide the "special one-time pension benefit" was not a "pure . . . genuine . . . [or] true" ERISA pension benefit. App. 104a-112a. (plaintiffs do not seek "vanilla" or "traditional" pension benefits; "[t]he use of the LTPP to fund buy-outs that are undeniably non-pension payments presents to the court [whether] a company can dip into an over-funded pension fund to pay termination pay wholly unrelated to pensions . . . and still hide behind ERISA").

These arguments fundamentally misapprehend the requirements for formulating valid amendments to pension plans, and the Tenth Circuit did not accept respondents' invitation to excise the LTPP from ERISA coverage because of its early retirement features.[8] The Tenth Circuit

8. *See generally Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995) (addressing requirements for amending employee benefit plan under ERISA § 402(b)(3)). In this regard, the Tenth Circuit undoubtedly understood that employers can -- and frequently do -- use pension benefits to accomplish business objectives (particularly encouraging employees to retire early), which, as long as it is done in accordance with ERISA's technical requirements, is perfectly permissible. *See, e.g., Anderson v. Consolidated Rail Corp.*, (Cont'd)

nonetheless imposed its artificial no-standing rule on the basis that, as former employees, respondents were "not entitled to the additional benefits at issue 'under the terms of [their] plan,' their state law claims do not fall within the scope of ERISA § 502(a)(1), and our subject matter jurisdiction cannot be based upon the doctrine of complete preemption." App. 33a (brackets in original). *Contra Astor*, 7 F.3d at 538 (recognizing claim under § 502(a)(1) for affirmatively misleading plan participants); *Mullins*, 23 F.3d at 667-68 (same); *Panaras*, 74 F.3d at 789 (also recognizing section 502(a)(1) "but for" claims); *Miller*, 334 F.3d at 341 (same); *Vartanian*, 14 F.3d at 701 (same). The Tenth Circuit's analysis invites the same kind of state-law mischief on remand that respondents' mischaracterization of the LTPP does.

4. The Tenth Circuit's further effort to make ERISA's applicability turn on the extent to which respondents' state-law claim overlaps with elements of ERISA claims

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(Cont'd)

297 F.3d 242, 252 (3d Cir. 2002) (employer who was downsizing its workforce was not liable under ERISA for terminating plaintiffs with severance pay and then amending pension plan to provide a more lucrative "voluntary separation program" for remaining employees); *Flanigan v. General Elec. Co.*, 242 F.3d 78, 87-88 (2d Cir. 2001) (an employer selling a division may have received a higher sale price by transferring surplus pension plan assets to the buyer, but did not violate ERISA because the surplus assets were used only to pay benefits to plan participants).

Respondents did not consider that, once Lucent amended the LTPP to provide the payment, it became a pension payment subject to the rules and regulations of ERISA or that the payment of benefits is a "central matter of plan administration." *Egelhoff*, 532 U.S. at 148.

(App. 35a, n.16) also eviscerates the ERISA policy of uniformity and fundamentally misapprehends the relief ERISA *does* provide. As set forth above, ERISA's applicability does not depend on the degree of alignment of its remedies with those under state law. Furthermore, while the elements of fraud might not overlap with all types of ERISA claims, including breach of fiduciary duty claims, the core allegations here -- that Lucent allegedly lied to get respondents to leave its workforce -- are undeniably sufficient to state an ERISA claim. *See, e.g.*, *Vartanian*, 14 F.3d at 701. *See also Varity*, 516 U.S. at 506 (employer who misleads employees that their benefits would remain secure if they voluntarily transferred to separately incorporated subsidiary when employer knew otherwise and was deceiving employees to save money violated ERISA's fiduciary obligations). Critically, under the Tenth Circuit's rule, the *Varity* plaintiffs themselves would not have had standing, as former employees subject to a new plan, to have sued for the greater benefits available to them under their former plan which they were deceived into abandoning.[9]

In short, the Tenth Circuit's erroneous decision on standing threatens a host of critical ERISA policies and the rights and obligations of benefit plans and participants alike. With a definitive ruling on the scope of participant status and standing and elimination of the conflict presented in this case, the Court can strengthen the enforcement of ERISA, promote the enforcement of claims by participants, and protect ERISA benefit plans from unwarranted inroads by state substantive law and damages claims.

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9. The Court similarly declined to find that respondents' state-law claims arose under ERISA § 510 (which prohibits interference with attainment of benefits), presented breach of fiduciary duty claims on behalf of the plan under Section 502(a)(2), or presented claims for equitable relief under ERISA's "catch-all" provision, Section 502(a)(3). App. 34a-35a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED OCTOBER 26, 2004

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 03-6112

AARON FELIX, SR.; ABILENE FLETCHER; ADA STUMP; ADELINE HATHORN; ALBERT SHULER; ALFRED WHITLOW; ALICE M. NEALEY; ALICE WOOD; ALLEN THREATT, III; ALZETIA BRUNER; AMELIA WARRIOR; ANA M. LASHLEY; ANETTA WICKWARE; ANGELA JONES; ANN FINK; ANNA REDD; ANNA SMITH; ANNIE PRINTERS; ARMANDINASANDERSON; ARTHUR FLYNN; B.K. IMMENSHUH; BARBARA E. HALL; BARBARA MANUEL; BARBARA RUST; BECKY POST; BENNETH BRASWELL; BERTHA REEVES; BETTY BELCHER; BETTY BRIDGES; BETTY CHAPMAN; BETTY D. PRIEST; BETTY JACKSON; BETTY JONES; BETTY SCHUNEMAN; BETTY TOOTLE; BILL W. MOORE; BILLY SUMMERS; BOBBIE JEAN ALLEN; BOBBY GILLESPIE; BOND W. LEE; BONG CHU CHONG; BONNIE IRVING; BRENDA ANDERSON; BRENDA KING; BURLENE MUNRO; C. WAYNE FAUCETT; CALVIN PRATER; CALVIN W. MINNICK, SR.; CAN T. PHAN; CAROL DETTMAN; CAROL DILL; CAROLL DARNALL; CAROLYN BUCKNER; CAROLYN FOX; CAROLYN J. WILLIAMS; CAROLYN LAWRENCE; CAROLYN YVONNE LARSEN; CARRIE J. ROBERSON; CARROLL L. HUNTER; CECIL BLAKE; CECIL BROWN; CHARLES H. BECK; CHARLES O. SESTAK; CHARLES W. MERRILL, JR.; C.C.K. BRADSHAW; CLARA WILLIS;

CLARENCE YAHOLA; CONNIE DUNN; CORINA HAPKE; CORNELIOUS ANDERSON; CRYSTAL LONG; CYNTHIA A. WILEY; DALE ROBINSON; DARLENE COLBERT; DARLENE WILLIAMS; DARYL KINNETT; DAVID BURBEE; DAVID DEERINWATER; DAVID LYNCH; DEBORAH COFFEY; DEBORAH MCCOOL; DEBORAH REEVES; DEIDRA KUBAT; DELORIS RICHARDSON; DELVIN REECE; DIANA PEPPERMAN; DIANE TRAYLOR; DIANA DEWEY; DIANE INSOGNA; DON CRABTREE; DON MCKENZIE; DONALD E. DYER; DONALD R. MCNEIL; DONALD WANZER; DORIS LESLEY; DOROTHY BOWENS; DOROTHY BUSH; DOROTHY FREEMAN; DOROTHY NICHOLS; DORIS DANIELS VOORHIES; DOUGLAS R. ALLEN; DOYLE D. MCENTIRE; DU PHAM; DUANE YECK; DUC TRAN; DUNG LAM; DUOUNG HOANG; EARL MILLIUS; EARL TAYLOR; EIKO RENDON; ELI WARRIOR, SR.; ELISE N. CECIL; ELIZABETH A. WHELAN; ELVONDA PRESLEY; EMMA H. OLDS; EMMA L. THOMAS; ERLINDA C. WISHON; ERRA TODD; ESTHER B. LAMPKIN; ESTHER BALLARD; ETTA FORSHEE; EUNICE F. BERRY; EVELYN NICKELS; FAYONA B. WILSON; FLORA THOMAS; FLORENCE HARRIS; FLOYD T. HYDEN; FRAN HARKER, SR.; FRANK WILSON; FRED TINSELY; GE. HETTEL; GAIL K. KITCHENS; GAIL V. HILL; GARY JORDAN; GARY WINTER; GEORGIA LEE JONES; GEORGIA MAE BRUNO; GERALD R. OLIVER; GERTRUDE KROUTIL; GEYRL FORCE; GLADYS M. FREDRICK; GLEN EADS; GLENDA ROSALES; GLENNA WINTER; GLORIA HICKS; GLORIA HIGH; GRACE E. HILL; HAN O.K. PARK; HANELORE MYERS; HAROLD KENNEDY; HAROLD L. BREWSTER; HAZEL MARSH;

HELEN SMITH; HERBERT WARD; HERMAN HOLLAND; HOWARD L. JENNINGS; HUE VU; HUNG VIETVU; HYAN ANTHONY; IDA P. HUBBARD; IMOGENE HARRISS; INELLA J. COOPER; ITTY V. EYADIEL; JACK NOWLIN; JAMES L. ROBINSON; JAMES E. HARRIS; JAMES E. HUBBARD; JAMES E. ROBERSON; JAMES FAIRLESS; JAMES G HENAGAR; JAMES TAYLOR; JANE WILLIAMS; JANE WOODARD; JANICE FELIX; JAQUELINE PONDER-LEWIS; JAYNE WARE; JEAN ELZEY; JEAN M. KAY; JEANNIE HICKS; JERRYL M. ASHLEY; JERRY CARL BRYANT; JERRY L. CRAWFORD; JERRY ENNIS; JERRY GLENN MILLER; JERRY SHROPSHIRE; JERRY W. HAMILTON; JEWEL BOYLES; JIM CORBIN; JIMMIE FLENNER; JO HOMAN; JOANN CHANDLER; JOAN HILL; JOAN SAWYER; JOHN A. STEWART; JOHN B. STEWART; JOHN E. MILLER; JOHN HILDEBRAND; JOHN JONES; JOHN M. PAGE; JOHN VARUGHESE; JOHN B. SEILAS; JOSEPHINE WYATT; JOYCE ANN MILLER; JOYCE J. PAYNE; JOYCE PALMER; JOYCE WILSON; JUANITA HARRIS; JUANITA KNAPP; JUDITH BURNHAM; JUDY RUCKER; JULLIA L. TEDDER; CLIFF WHEELER; K. SUK LEE; K.C. GEORGE; K.T. LAM; KAREN C. WILKINS; KATHERINE BELLIS; KATHERINE KILBY; KATHERINE NICHOLS; KAY C. ROWLAND; KAYE RUSSELL; KENNETH KORTEMIEIER; LADONNA PETERSON; LARUE RICHARDSON; LAVONDA WALDRON; LARRY BASE; LARRY JORDAN; LARRY R. FOX; LAURA SCOTT-KEEFER; LAWANA K. WEEKS; LE HUU LE; LEE ANN WITTENBERG; LEE GORRELL; LENA MITCHELL; LEO STEEL, JR.; LEONA CHICORASKE; LEONARD HUMPHRIES; LEROY GILLESPIE; LETRICIA HIGGS; LINDA ALBERS; LINDA

ALLEN; LINDA CANTRELL; LINDA KLOFKORN; LINDA L. STEWART; LINDA MAESTAS; LINDA R. ZACHARY; LINDA STRAUSS; LINDA THATCH; LINDA WARDEN; LINNIE PHILLIPS; LOIS JOHNSON; LONNIE R. LEDFORD; LORETTA BATTLE; LORETTA HILTON; LORETTA RIDINGS; LOUIS A. SCHUNEMAN; LOUISE HAMMAN; LOUISE HAMPTON; LYNDA C. CURRIN; LYNN STEWART; MAC WINKLER; MARGARET CRAWFORD; MARGARET DARNALL; MARGARET GROCE; MARGARET L. CURTIS; MARGARET L. JOHNSON; MARY MCELYEA; MARGARET TAYOR; MARIA TIDWELL; MIRIAM R. EDWARDS; MARILYN M. KORNMAIER; MARK WILLIAMS; MARLENA DENNIS; MARSHA W. CARTLEDGE; MARTHALENE DUNLAP; MARTINA PAGE; MARVA AKINS; MARVIN G. GILLILAND; MARIANNE B. PONDER; MARY C. JOHNSON; MARY DAVIS; MARY DICK; MARY HOBBY; MARY HOUSNER; MARY KELLER; MARY L. CURTIS; MARY LOU MCCALL; MARY MEEHAN; MARY ROY; MARY SMILEY; MARY WANZER; MAT THI CAO; MATTIE KINNETT; MCHYL L. SUMMERS; EVERETT CONLEY; MELBA MOORE; MICHAEL MARLOW; MICHAEL ROBERTSON; MILDED DREW; MOLLY HARRELL; MONA STRAUGHN; MORRIS SCOBEY, JR.; NANCY HOLMES; NANCY STATEN; NAOMI CHAPMAN; NAZIM ABDUL-LATIF; NELDA BOHN; NHAN TRAN; NHI THI TRUONG; NHUNG NGUYEN; NUMER NORRIS; OMER G FLOYD, JR.; ORALEE KEMP; PAMELA HENAGAR; JOHN JONES; PAT LYTAL; PATRICIA RODGERS; PAT WALLACE; PATRICIA BARBER; PATRICIA EWING; PATRICIA HARRELL; PATRICIA WOODS; PATRICK FORSEE; PATRICK

PETERSON; PAULA SAGAL; PEARLIE MCKISSIC; PEARL WILSON; PEGGY ANDERSON; PEGGY BROOM; PHAN NGUYEN; PHYLLIS NUTT; RACHAEL EYADIEL; RACHEL TOBEY; RAYMOND MITCHELL; RENA BENOIT; RHELDA NYE; JACKIE CANTRELL; RICHARD BENOIT; RICHARD L. HALL; RITA J. FOSTER; ROBERT C. SHUE; ROBERT HOLMES; J. ROBERT MUNRO; ROBERT WYATT; ROGER D. CRAFT; RONALD AVANTS; RONALD O. STAFFORD; RONALD JAGOSH; RONALD NORRIS; RONALD WANZER; RONNIE TRAYLOR; ROSETTA WARRIOR; ROY KLEPPER; RUBY BELSHE; RUBY TIDMORE; RUSSELL GALLOWAY; RUSSELL OWENS; RUTH BOYER; RUTH LYNCH; RUTHIE O. KING; SAMARION JACKSON; SANDRA EAST; SANDRA HUMPHREY; SANTHOSH PUNNOSE; SEUNG MOON; SHERRY M.RUSSELL; SHIRLEY ALLEN; SHIRLEY CONRAD; SHIRLEY GLOVER; SHIRLEY GREEN; SHIRLEY GRIFFIS; SHIRLEY HINES; SHIRLEY NESS; SHIRLEY PRINCE; STANLEY E. GOOCH; STELLA ZARAGOSA; SUSAN KOUTS; SUSAN PANNELL; SUSAN WILSON; SYLVIA BARTEMY; THAU DINH TRAN; THELMA LOGAN; THURLOW TRIPP; TOM ANDERSON; TOMMY GREEN; TUYEN Q. NGUYEN; UYEN NGUYEN; VALERIE H. WOOD; VERA CLARK; VINH VAN CAO; VIRGINIA LEDFORD; VIRGINA RODRIGUEZ; W. TERESA CHILDS; WALTER EISENMAN; WALTER GILPEN; WANDA AULTMAN; WANDA CARSON; WANDA F. SMITH; WANDA GALLANT; WANDA JORDAN; WANDA LOWRY; WANDA MACK; WARREN C. FISHER; WILLA PRINCE; WILLIAM HOSTETLER; WILLIAM J. WALTON; WILLIAM D. ROY; WILLIS JONES; WILMA LONG; WILSIE KOZAK;

Appendix A

YOUNG W. KANG; YVONNE WHITE; REGINA ALLENSWORTH; EMERALD NESS; JUDITH IRENE WILLIAMS; JERRY M. GARTON; J. GUADALUPE SANCHEZ; RAYMOND MACK; EVELYN B. WARE; LINDA MARCHANT; RICHARD SETZER; ANN NALLEY; ARVILLA BISSELL; JOHN D. CANNEDY; RHEA COLLIER; JO ANN CHANDLER; HUONG N. DO; ROBERT GIBBS; ROY T. JOHNSON; KIET TUAN LAM; MARY J. LAMBERT; RON F. MCNIELL; MELBA W. MERRILL; JOYCE J. PAYNE; CAN THAN PHAN; LADONNA PETERSON; ELVONDA PRESLEY; SHERRINE RANDALL; SANDRA REEVES; H. CAROLYN RICHARDSON; LINDA B. RICHARDSON; VIRGINIA LOUISE REECE; MARSHA SHANKS; TONY SOLIZ; GENINE STEWART; MONA L. STRAUGHAN; KENNETH TOOTLE; PETER T. VU; PEARLINE D. WHITE; ETHEL JACKSON; LINDA BIRKES; RANDY BROOKS; CHARLOTTE BROOKS; JERRY W. BUSER; CATHERINE A. BELLIS; SUN KI LEE; MYRTLE L. HENSON; BILL EISENMAN; TUAN VINH; CARROLL LEON HUNTER; SHARON L. STEWART; SUSAN PAK; DU V. PHAM; SAMUEL J. BUCKNER; JOSEPH KUNNATH; ALICE WILLIS,

Plaintiffs - Appellants,

v.

LUCENT TECHNOLOGIES, INC., a Delaware Corporation,

Defendant - Appellee.

Appendix A

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-02-289-L)

Before **EBEL, ANDERSON,** and **McCONNELL,** Circuit Judges.

EBEL, Circuit Judge.

Plaintiffs, a group of former employees of Defendant Lucent Technologies, Inc. ("Defendant"), sued Defendant in state court for fraud arising out of alleged misrepresentations made in encouraging Plaintiffs to take an early retirement benefits package. Defendant removed the case to federal court on the basis of complete preemption under the Employee Retirement Income Security Act ("ERISA") and the Labor Management Relations Act ("LMRA"), and then moved to dismiss. Plaintiffs filed a motion to remand, which was denied by the district court on the basis of ERISA complete preemption. Plaintiffs appealed this order, and Defendant now asserts the same grounds for removal jurisdiction as it did below, in addition to arguing for complete preemption under §§ 7-8 of the National Labor Relations Act ("NLRA").

Exercising jurisdiction over the district court's order under 28 U.S.C. § 1291, we conclude that Plaintiffs' state law fraud claims are not completely preempted by ERISA, the LMRA, or the NLRA. Accordingly, we REVERSE and REMAND with instructions to remand to state court.

Appendix A

BACKGROUND

Plaintiffs, a group of former employees of Defendant Lucent Technologies, Inc., worked at a manufacturing facility in Oklahoma City known as the Oklahoma City Works ("OKCW"). In their Fourth Amended Petition ("FAP"), Plaintiffs alleged the following[1]:

> Because of a series of substantial financial reversals Lucent determined to sell off its manufacturing facilities including OKCW. It communicated to its workforce at OKCW its intent to restructure and engaged in a series of highly-publicized attempts to sell its manufacturing plants or merge with other similar companies. In an effort to make it more attractive to purchasers/merging companies Lucent determined to reduce the number of long-term senior employees at the OKCW.
>
> On February 19, 2001, Lucent entered into a Memorandum of Agreement with the International Brotherhood of Electrical Workers ("IBEW") System Council EM-3 whereby OKCW employees that were retirement-eligible would retire in exchange for receipt of a payment equivalent to 110% of the amount of termination allowance to which the employee would be entitled if the employee was laid-

1. Because this is an appeal from an order granting a motion to dismiss, we accept all allegations in the plaintiff's complaint as true. *See Mitchell v. King*, 537 F.2d 385, 386 (10th Cir. 1976). For the purposes of removal, Defendant also accepted as true Plaintiffs' allegations. Because these allegations are relatively concise and much turns on our characterization of the nature of these allegations, we quote most of the complaint above.

off for lack of work up to a maximum of 32 years' service (under the applicable IBEW collective bargaining agreements) plus a "special pension benefit" in the amount of $11,000 which represented the amount to which the employee was otherwise entitled under a pending National Labor Relations Board award against Lucent. These payments were to be made out of the over-funded portion of the Lucent (originally AT&T[2]) pension plan funded by the employees at the OKCW. Additionally, for those OKCW employees that were not then retirement-eligible, Lucent proposed to provide a transitional leave of absence by adding 5 years to the age and/or service to make the employee pension-eligible and to reduce to the extent possible any pension discount for early retirement. Acceptance of Lucent's offer had to be made by May 29, 2001, and an employee accepting the offer would leave the OKCW roll on June 30, 2001.

Written material was distributed to the employees at the OKCW and meetings were held with Lucent representatives at which these benefits were outlined. Based upon information communicated to its officers and representatives by Lucent, the IBEW locals at the OKCW also provided information to the employees.

At each meeting attended by each individual plaintiff, it was stated by Lucent's authorized representatives that the offer being made by Lucent was a one-time, non-negotiable, final offer that was a take-it-or-leave-it proposal and that any delay by any employee in accepting the offer would not result in any additional benefit.

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2. Defendant was a spin-off from AT&T.

To the contrary, it was emphasized at such meetings that failure to accept Lucent's offer was risking the benefits being offered since Lucent might file bankruptcy or merge with another company.

In a newsletter distributed by IBEW Local 2021 on March 15, 2001, the union President stated:

> For those of you who feel there may be even more offered if you wait, I assure you there will not be any additional incentives for retirement.

In reliance upon the representations made by Lucent (and reiterated by union officials) that the offer being made was a take-it-or-leave-it . . . offer and that delaying retirement not only would not gain the employee additional benefits, but instead might jeopardize all of these benefits, over 1,000 eligible employees, including all of the plaintiffs herein, timely accepted the offer, retired, and left the OKCW roll on June 30, 2001.

Subsequently, Lucent entered into an agreement with Celestica, Inc., a Canadian corporation involved in the manufacture of computer and telecommunications equipment whereby Celestica, Inc. was to act as a contract manufacturer and take over the operation of the OKCW and hire as its employees certain remaining OKCW Lucent employees on November 30, 2001.

Contrary to the representations made by Lucent, on October 1, 2001, Lucent agreed to pay retirement-eligible (and those made eligible by the 5+5 transitional offer) employees still on the OKCW roll benefits identical to

> those paid to the plaintiffs **plus** an additional payment of a "special one-time pension benefit" by Lucent of $15,000. . . .
>
> Lucent intentionally misrepresented to each plaintiff the nature of the offer as described . . . above with the intent to induce each plaintiff to rely upon such misrepresentations and to change their respective positions to their detriment. Rather than a "one-time offer", Lucent knew at the time such misrepresentations were made that additional "sweeteners" would be made to reduce the number of senior employees in the OKCW workforce.
>
> Each plaintiff did rely upon such misrepresentations in making the decision to retire on June 30, 2001. No plaintiff had the opportunity or ability to discover the truth concerning such misrepresentations.

Plaintiffs requested as damages the additional $15,000 benefit that was later offered to the remaining employees, the value of an additional year of service that was lost by accepting the June 30 retirement date,[3] and punitive damages.

Defendant removed the case to federal court on the basis of "complete preemption" under ERISA and the LMRA, and then moved to dismiss for failure to state a claim. Plaintiffs moved to remand the case back to state court, arguing that

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3. Specifically, Plaintiffs alleged that "a significant number of plaintiffs with a short time to their respective anniversary dates lost an additional year of service by accepting the June 30th retirement date. Each lost year was worth as much as $4,000 in the special pension payment plus a reduction in the amount of the respective pension over the life of each pension."

their claims were not completely preempted and that the federal district court thus lacked subject matter jurisdiction. In the same order, the district court denied Plaintiffs' motion to remand and granted Defendant's motion to dismiss, relying exclusively on complete preemption under ERISA. Plaintiffs now appeal this order.[4]

DISCUSSION

***Standard of Review*:**

We review de novo the question of whether Plaintiffs' state law claims are completely preempted. *See Conover v. Aetna U.S. Health Care, Inc.*, 320 F.3d 1076, 1077 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 2902 (2004); *Garley v. Sandia Corp.*, 236 F.3d 1200, 1206-07 (10th Cir. 2001) ("Whether state law is preempted by federal law is a conclusion of law which we ... review *de novo*. We review a denial of a motion to remand a claim for lack of removal jurisdiction *de novo*.") (citations omitted).

We also review de novo a dismissal for failure to state a claim. *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999).

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4. Defendant points out that Plaintiffs' Notice of Appeal only designates the order granting dismissal, not the order denying remand. Defendant then concludes that the judgment on the motion to remand may not be properly before us, even though both judgments were contained in the same order by the district court. However, because the issue in the motion to remand is whether federal courts have subject matter jurisdiction over this case, we must address it *sua sponte*. *See Lopez v. Behles (In re Am. Ready Mix, Inc.)*, 14 F.3d 1497, 1499 (10th Cir. 1994).

Analysis:

I. Were Plaintiffs' fraud claims properly removed on the basis of "complete preemption" under ERISA?

Plaintiffs argue that the district court erred in denying their motion to remand and dismissing the case for failure to state a claim. Specifically, Plaintiffs argue that, contrary to the district court's holding, their state fraud claim was not "completely preempted" by ERISA.[5] We agree with Plaintiffs.

Important to understanding the propriety of removing the instant case is the distinction between "conflict preemption" under § 514 of ERISA and "complete preemption" under § 502(a) of ERISA. Because these two concepts are often confused, as they were in the instant case, we provide an explanation of both before we analyze the district court's denial of the motion to remand here.

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5. The Employee Retirement Income Security Act of 1974 ("ERISA"), codified at 29 U.S.C. § 1001 *et seq.*, is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). It covers both employee pension plans and welfare plans that meet its definitions under 29 U.S.C. § 1002(1)-(3). *Id.* at 90-91. The parties in the instant case do not dispute that Defendant's pension plan at issue is covered by ERISA.

ERISA "imposes participation, funding, and vesting requirements on pension plans. It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility. . . . ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits." *Id.* (citations omitted).

Appendix A

A. ERISA § 514 Conflict Preemption

Section 514 of ERISA, codified at 29 U.S.C. § 1144, contains an express preemption provision that provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a) (2000). The Supreme Court has "observed repeatedly that this broadly worded provision is 'clearly expansive.' " *Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001). "But at the same time, [the Court has] recognized that the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminacy,' or else 'for all practical purposes pre-emption would never run its course.' " *Id.* (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)).

The Court has held that a state law "relates to" an ERISA plan, and is thus preempted under § 514, "if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). Further, the Court has

> cautioned against an uncritical literalism that would make pre-emption turn on infinite connections. Instead, to determine whether a state law has the forbidden connection, we look both to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive, as well as to the nature of the effect of the state law on ERISA plans.

Egelhoff, 532 U.S. at 147 (quotations and citations omitted). This preemption provision does not apply "if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability." *District of Columbia v. Greater Wash. Bd. of Trade,* 506 U.S. 125, 130 n. 1 (1992) (quotations and citations omitted); *see also Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 39 F.3d 1078, 1084 (10th Cir. 1994) (*en banc*) (same).

B. "Complete Preemption" Under ERISA

The Supreme Court has explained, "Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant.[6] Absent diversity of citizenship, federal-question jurisdiction is required." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392, (1987). "The presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Id.* "The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Id.* The

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6. Title 28 U.S.C. § 1441 provides:

> "(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

general rule is that a federal defense, even one relying on the preclusive effect of a federal statute, is not enough to authorize removal to federal court. *Beneficial Nat'l Bank v. Anderson,* 539 U.S. 1, 6 (2003).

However, the Supreme Court has recognized an exception or "independent corollary" to the well-pleaded complaint rule known as the "complete pre-emption" doctrine. *Caterpillar,* 482 U.S. at 393. Among the first cases to recognize this doctrine was *Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557 (1968), where the Court held that the state court suit to enjoin a union strike under state law was properly removed because it arose under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, which grants federal jurisdiction over suits for violations of collective bargaining agreements. *Id.* at 560. The Court later characterized *Avco* as the wellspring of the complete preemption doctrine:

> The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization. Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the

> federal cause of action necessarily "arises under" federal law [and is thus removable].

Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 23-24 (1983) (quotations and footnotes omitted).

In *Franchise Tax Board,* the Court explained that whereas § 301 of the LMRA created a cause of action under which the *Avco* plaintiff could enforce the LMRA in federal court, the parallel enforcement provision of ERISA, § 502(a) (codified at 29 U.S.C. § 1132(a)), did not cover the state government plaintiff's claim to enforce tax levies against trust funds held by an ERISA trustee. The state taxing authority was not a "participant" or "beneficiary" of an ERISA plan and thus was not given a cause of action under § 502(a). *Id.* at 24-25. Thus, the claims before the Court did not "arise under" § 502(a) of ERISA. *Id.* at 25. The Court held that because ERISA conflict preemption under § 514 alone is not sufficient to support removal of a well-pled complaint alleging a state cause of action, and because the plaintiff before it could not have brought its claim as a federal cause of action under the civil enforcement provision of ERISA (§ 502), there was no complete ERISA preemption and removal was improper. *Id.* at 25-27.

Four years later, the Supreme Court addressed the question left open in *Franchise Tax Board:* whether a state law claim that *does* fall within the scope of section 502(a) of ERISA is removable to federal court under the doctrine of complete preemption. In *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58 (1987), the Court answered the question in the affirmative, holding that the complete preemption doctrine allows the removal of state actions that fall within the scope

of § 502(a), ERISA's civil enforcement provision.[7] *Id.* at 64, 67. Noting that the "language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA [at issue in *Avco*]," the *Taylor* Court found that ERISA manifested sufficient congressional intent to recharacterize state law claims that fall within the scope of § 502(a) as federal claims subject to removal. *Id.* at 65-66.

The Court recently further refined the doctrine of complete preemption under ERISA in *Aetna Health Inc. v. Davila,* __ U.S. __, 124 S. Ct. 2488 (2004), where it phrased the test as follows:

> [W]here the individual is entitled to such [claimed] coverage only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA or the plan terms is violated, then the suit falls "within the scope of" ERISA § 502(a)(1)(B). In other words, if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted by ERISA § 502(a)(1)(B).

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7. Section 502(a)(1) provides a cause of action to any plan beneficiary or participant to recover benefits due under the terms of a pension plan, to enforce rights under the terms of the plan, or to clarify rights to future benefits under the terms of the plan. 29 U.S.C. § 1132(a) (2000).

Id. at 2496 (citation omitted). In *Davila,* the Court held that a claim brought under a separate statute for drug benefits under an ERISA plan was completely preempted because the claim was not independent of the ERISA plan. *Id.* at 2496, 2498.

In sum, the preemptive force of § 502(a) of ERISA is so "extraordinary" that it converts a state claim into a federal claim for purposes of removal and the well-pleaded complaint rule. *Taylor,* 481 U.S. at 65.

C. Distinction Between Preemption and Complete Preemption in the Context of ERISA

Although courts and parties often confuse § 514 preemption with § 502(a) complete preemption, the Supreme Court has held that the two are distinct concepts, with only the latter supporting removal. In *Taylor,* the Court first explained that "federal pre-emption is ordinarily a federal defense to the plaintiff's suit," and thus is insufficient grounds for removal. 481 U.S. at 63. The *Taylor* Court stated that there was no dispute that the plaintiff's state law claims were preempted under § 514 of ERISA in the case before it, but that the remaining question was "whether or not the *Avco* principle can be extended to statutes other than the LMRA in order to recharacterize a state law complaint displaced by § 502(a)(1)(B) as an action arising under federal law." *Id.* at 64 (emphasis added).

The Court next pointed out that it had previously held in *Franchise Tax Board,* 463 U.S. at 25-27, that "ERISA pre-emption [under § 514], without more, does not convert a

state claim into an action arising under federal law." *Taylor,* 481 U.S. at 64. "The [*Franchise Tax Board*] court suggested, however, that a state action that was not only pre-empted by ERISA [under § 514], *but also* came within the scope of § 502(a) of ERISA might fall within the *Avco* rule [of complete preemption]." *Id.* (emphasis added, quotations omitted). The Court then found that state claims falling within the scope of § 502(a) (as contrasted with those state claims that merely "relate to" plans under § 514) were indeed completely preempted and thus removable. *Id.* at 66. The Supreme Court recently affirmed this approach in *Beneficial National Bank,* where it held that a federal statute completely preempts a state law cause of action when the state claim "comes within the scope of that [federal] cause of action," discussing § 502(a) of ERISA. 539 U.S. at 8.

We have explained that ERISA preemption under § 514 is not sufficient for removal jurisdiction and that a state law claim is only "completely preempted" under *Taylor* if it can be recharacterized as a claim under § 502(a). For example, in *Schmeling v. NORDAM,* 97 F.3d 1336 (10th Cir. 1996), we stated that the Supreme Court in *Taylor* found that "the plaintiff's state claims were preempted by ERISA but noted that under the well-pleaded complaint rule, federal preemption is a defense and generally does not authorize removal." *Id.* at 1340. However, we continued, the *Taylor* Court "reluctantly extended the principle to allow the removal of state actions within the scope of section 502(a) of ERISA. It was stressed that ERISA preemption alone was insufficient to recharacterize the plaintiff's claim as federal." *Id.*

We then provided the following explanation of the Tenth Circuit's view of complete preemption under *Taylor* and other Supreme Court precedent:

> We read the term not as a crude measure of the breadth of the preemption (in the ordinary sense) of a state law by a federal law, but rather as a description of the specific situation in which a federal law not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action, thereby manifesting Congress's intent to permit removal. . . . This usage reveals that "complete preemption" refers to the replacement of a state cause of action with a federal one.

Id. at 1342. We cautioned that we were not insinuating that "a federal cause of action must provide the same remedies as offered by the preempted state cause of action." *Id.* at 1343. However, because the FAA drug testing laws did not give any cause of action to the plaintiff in *Schmeling* (who was challenging an FAA certified air repair station's drug testing policies under state law), we held that the plaintiff's state court action was not removable to the federal courts under the complete preemption doctrine. *Id.* at 1337, 1344.

Similarly, in *Carland v. Metropolitan Life Insurance Co.*, 935 F.2d 1114 (10th Cir. 1991), we explained the difference between ERISA preemption and removal jurisdiction and held that "a state law claim will convert to a federal claim [and will thus be removable] only if the claim is preempted by ERISA [under § 514] *and* within the scope of ERISA's

civil enforcement provisions [§ 502(a)]." *Id.* at 1118-19 (emphasis added); *cf. Meyer v. Conlon,* 162 F.3d 1264, 1268 n. 2 (10th Cir. 1998) (explaining in a non-ERISA context that the parties confused "complete preemption" with "ordinary preemption," and stating that the two analyses are not "fungible").[8]

We are not alone in distinguishing the concept of § 514 preemption and § 502 "complete preemption." For example, the en banc Sixth Circuit stated that "[r]emoval and preemption are two distinct concepts," and that removal jurisdiction based on § 502 is narrower than preemption defenses based on § 514. *Warner v. Ford Motor Co.,* 46 F.3d 531, 535 (6th Cir. 1995) (*en banc*). The court then overruled its prior precedent for "mistakenly allow[ing] removal in a case not covered by § 1132(a)(1)(B) [§ 502 of ERISA] and only arguably covered by § 1144(a) [§ 514 of ERISA]." *Id.*

Similarly, the Fifth Circuit explained, "The presence of conflict-preemption [under § 514] does not establish federal question jurisdiction. Rather than transmogrifying a state cause of action into a federal one – as occurs with complete preemption – conflict preemption serves as a *defense* to state action." *Giles v. NYLCare Health Plans, Inc.,* 172 F.3d 332, 337 (5th Cir. 1999) (emphasis in original). The court continued, "When a complaint contains only state causes of

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8. To the extent that any language in *Settles v. Golden Rule Insurance Co.,* 927 F.2d 505, 508 (10th Cir. 1991), suggests that removal may be grounded in § 514 preemption, we dismiss it as dicta because the plaintiff there had brought her action in diversity and the issue in that case was not complete preemption but only conflict preemption under § 514 as a defense.

action that the defendant argues are merely conflict-preempted [under § 514], the court must remand for want of subject matter jurisdiction." *Id.*[9]

To summarize:

> The difference between preemption and complete preemption is important. When the doctrine of complete preemption does not apply, but the plaintiff's state claim is arguably preempted under § 514(a), the district court, being without removal jurisdiction, cannot resolve the dispute regarding preemption. It lacks power to do anything other than remand to the state court where the preemption issue can be addressed and resolved.

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9. *See also King v. Marriott Int'l, Inc.*, 337 F.3d 421, 425, 428 n. 3 (4th Cir. 2003) (noting that "[i]n cases of complete preemption, however, it is misleading to say that a state claim has been 'preempted' as that word is ordinarily used. . . . [A] vital feature of complete preemption is the existence of a federal cause of action that replaces the preempted cause of action"; holding that a state claim must fit within the scope of § 502; and disregarding § 514 preemption); *Toumajian v. Frailey,* 135 F.3d 648, 654-55 (9th Cir. 1998) (providing a thorough discussion of "conflict preemption" under § 514 and "complete preemption" under § 502, and noting that "[i]f both conditions [§ 514 and § 502] are not met . . . the federal court does not have subject matter jurisdiction and the matter should be remanded"); *Rice v. Panchal,* 65 F.3d 637, 646 (7th Cir. 1995); *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 355 (3d Cir. 1995) ("That the Supreme Court has recognized a limited exception to the well-pleaded complaint rule for state law claims which fit within the scope of § 502 by no means implies that all claims preempted by ERISA are subject to removal."); *Lupo v. Human Affairs Int'l, Inc.*, 28 F.3d 269, 272 (2d Cir. 1994).

Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 355 (3d Cir. 1995). This is true regardless of the strength of the defendant's argument for § 514 preemption. *Taylor*, 481 U.S. at 66 ("[E]ven an 'obvious' pre-emption defense does not . . . create removal jurisdiction.").

D. Are Plaintiffs' state law fraud claims completely preempted so as to provide subject matter jurisdiction for removal?

The district court in the instant case found that Plaintiffs' state law claims were "related to" an ERISA plan and were thus preempted under the broad language in § 514. This finding may be correct. *See, e.g., Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 755-56, 758 (5th Cir. 1990) (finding § 514 preemption in similar case). However, as discussed above, § 514 preemption is merely a federal defense that cannot provide the basis for removal jurisdiction. We thus turn to the separate question of whether Plaintiffs' claims fell within the scope of § 502(a) and were thus completely preempted. We ultimately conclude in this section that Plaintiffs could not have brought these fraud claims under § 502(a) because their suit is not one to recover benefits due to them under the terms of their employee benefit plan. Accordingly, we reverse the district court's finding of complete preemption.

1. Standing to Sue under ERISA

A plaintiff must have standing to sue under § 502(a) before his or her state law claim can be recharacterized as arising under federal law subject to federal jurisdiction under the doctrine of complete preemption. *See Hobbs v. Blue Cross*

Blue Shield of Ala., 276 F.3d 1236, 1240-41 (11th Cir. 2001); *Lehmann v. Brown*, 230 F.3d 916, 919 (7th Cir. 2000); *Harris v. Provident Life and Accident Ins. Co.*, 26 F.3d 930, 934 (9th Cir. 1994). Section 502(a)(1) of ERISA provides a cause of action to any "participant or beneficiary[10] . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1) (2000). Congress defined "participant" to mean:

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7). In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Supreme Court clarified that under the statute, a former employee with no reasonable expectation of returning to covered employment must have a "colorable claim to vested benefits" under the plan. *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1533 (10th Cir. 1993) (citing *Firestone*, 489 U.S. at 117-18) (quotations omitted).

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10. ERISA defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). There is no contention in this case that Plaintiffs are beneficiaries of a plan due to being so named by some other participants. Accordingly, we focus our discussion on Plaintiffs' status as participants, not as beneficiaries.

Here, Plaintiffs do not seek "to recover benefits due to [them] under the terms of [their] plan, to enforce [their] rights under the terms of the plan, or to clarify [their] rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1). Neither Plaintiffs nor Defendants contend that Plaintiffs are entitled to the additional benefits under the plan. *See* Pl. Reply Br. 7 (plaintiffs do not seek pension benefits or claim that the payments they received were less than to which they were entitled); Def. Br. 13 ("It is undisputed that plaintiffs were not eligible for the $15,000.00 'special one-time pension benefit' because they were no longer Lucent employees in September 2001. . . .") Rather, Plaintiffs claim that they were fraudulently induced to take early retirement, to their financial detriment; they seek monetary damages from their employer (not from the pension plan) for that alleged fraud. That is not a claim "to recover benefits due to [them] under the terms of [their] plan," and therefore falls outside the scope of 29 U.S.C. § 1132(a)(1).

2. The "But For" Exception

Defendants contend, however, that Plaintiffs' claim is completely preempted because it is, in substance, a claim that "but for" Defendants' wrongful actions, they would have been entitled to the additional benefits under the plan. The circuits are split over whether plaintiffs have standing to sue under ERISA in such a case. Although the First, Second, Fifth, Sixth, and Eighth Circuits have held that former employees may sue under ERISA if they make a "but for" claim of this sort,[11]

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11. *See, e.g., Adamson v. Armco, Inc.*, 44 F.3d 650, 654-55 (8th Cir. 1995); *Swinney v. Gen. Motors Corp.*, 46 F.3d 512, 518-19 (6th Cir. 1995); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 667-68 (2d Cir.

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we, along with the Fourth and Eleventh Circuits, have rejected this approach. *See Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1535 (10th Cir. 1993); *Sanson v. Gen. Motors Corp.*, 966 F.2d 618, 619 (11th Cir. 1992); *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 466 (10th Cir. 1990); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 433 (4th Cir. 1986).

In *Mitchell,* a former employee claimed that an allegedly unlawful change in the terms of a retirement benefit plan had the effect of denying him "additional benefits which he would have received" but for the employer's actions. 896 F.2d at 474. According to the court, the plaintiff was "seek [ing] a damage award, not vested benefits improperly withheld." *Id.* This court thus held that he did not have standing to bring suit for the additional benefits under ERISA. *Id.*[12]

In *Raymond,* we relied on *Mitchell* to hold that former employees who had received the full extent of their vested

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1994); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 702-03 (1st Cir. 1994); *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1220-21 (5th Cir. 1992). These cases, however, are not all uniform in their application of a "but for" test; rather, they express disparate iterations and applications of that test.

12. In *Mitchell,* the plaintiff had received his pension benefits in the form of a lump sum payment upon retirement, and thus was no longer a "participant" in the plan at the time of the lawsuit. 896 F.2d at 474. The significance of the case, for present purposes, however, lies in the Court's holding that his claim for damages on the basis of the employer's allegedly wrongful conduct, which had the effect of denying him additional pension benefits, did not fall within the scope of the right to sue under ERISA.

benefits did not have the right to sue under ERISA for additional benefits that they might have received but for the wrongful conduct of their employers. 983 F.2d at 1535 (citing *Mitchell,* 896 F.2d at 474). This is because where a former employee has received all benefits entitled to him under his plan at the time of retirement, he has no "colorable claim" that additional benefits have "vested" or "will vest." *Id.* (quotations omitted). The plaintiffs were not eligible or likely to become eligible to receive the additional benefit at the time they filed the suit. *Id.* "They therefore seek 'a damage award, not vested benefits improperly withheld.'" *Id.* (quoting *Mitchell,* 896 F.2d at 474).

We pointed out that "the receipt of the 'full extent' of [plaintiffs'] vested benefits" was a "crucial" fact, because that meant that the plaintiffs "seek a damage award based upon their allegedly fraudulent discharge from their jobs; they do not seek 'vested benefits improperly withheld.'" *Id.* at 1536. We then explicitly rejected a "but for" test for ERISA standing.[13] We stated, "To say that but for Mobil's conduct, plaintiffs would have standing is to admit that they lack standing and to allow those who merely *claim* to be participants to be deemed as such." *Raymond,* 983 F.2d at 1536. Because there is no controlling case law or statutory

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13. Although the *Raymond* court did not cite *Mitchell* as rejecting the "but for" test, the *Mitchell* court had indeed rejected a similar argument "that Mobil's violation of ERISA entitled [the plaintiff] to additional benefits which he would have received had Mobil's amendments to the Plan not compelled him to retire at fifty-six, rather than sixty." *Mitchell,* 896 F.2d at 474. We held, "Since these benefits had not yet vested, Mr. Mitchell could not have a colorable claim to vested benefits. . . ." *Id.*

language to support such a "but for" exception to find ERISA standing where the plaintiff is not technically entitled to the additional benefit under the pension plan, we declined to create an exception to *Firestone* and rejected the availability of any "but for" test. *Id.*[14]

Our holding in Raymond was consistent with our prior opinion in *Boren v. Southwestern Bell Telephone Co., Inc.*, 933 F.2d 891 (10th Cir. 1991), where we had held that a plaintiff did not have ERISA standing because he did not claim to seek "vested benefits improperly withheld." *Id.* at 893-94 (quotations omitted). Specifically, we stated that Mr. Boren "had no vested benefits because he was not enrolled in the Plan," and we rejected his claims that the defendant "should have enrolled him in the Plan." *Id.* "This sort of claim is not within the jurisdictional grant of ERISA." *Id.*

Just a couple of months after we decided Raymond, we applied its holding to deny an ERISA plaintiff standing in *Alexander v. Anheuser-Busch Cos., Inc.*, 990 F.2d 536, 538-39 (10th Cir. 1993). Because Alexander was a "former

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14. The "but for" circuits mistakenly assume that our jurisdiction depends only on the traditional notion of "standing." In § 502(a)(1)(B) ERISA cases, we only have *jurisdiction* over suits brought "to recover benefits due to [the plaintiff] under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1). As the Supreme Court has explained, "The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties" outlined in § 502. *Franchise Tax Bd.*, 463 U.S. at 21. Therefore, the requirement of § 502 is "both a standing and a subject matter jurisdictional requirement." *Stanton*, 792 F.2d at 434; *see also Miller v. Rite Aid Corp.*, 334 F.3d 335, 340 (3d Cir. 2003) (same).

employee" and lacked any reasonable expectation of returning to his employment, we stated that Alexander would have standing, "if at all, only if he has a colorable claim that he will prevail in a suit for benefits." *Id.* at 539. We found that Alexander did not have such a "colorable" claim for benefits under his plan because his preexisting medical condition was clearly excluded by the plain language of his policy terms. *Id.* Any damages that Alexander had requested for the defendant's misrepresentations regarding plan coverage were merely claims for "a damage award, not vested benefits improperly withheld." *Id.* (quotations omitted).

In sum, we have rejected a "but for" test for determining standing to sue under ERISA. We have found a lack of a "colorable claim to vested benefits" where the plaintiffs have already received full payment of all benefits entitled to them under their plan as it existed at the time of their retirement, *see Raymond,* 983 F.2d at 1536, where the plaintiff was not enrolled in the pension plan at issue, *see Boren,* 933 F.2d at 893-94, and where the plaintiff's medical condition was excluded by the terms of the ERISA health plan (notwithstanding defendant's misrepresentations to the contrary). *See Alexander,* 990 F.2d at 538-39.

The Eleventh Circuit likewise rejects a "but for" definition for standing to sue in an ERISA action. In *Sanson,* the plaintiff alleged that General Motors had fraudulently represented to him that benefits under a special retirement program would not be offered to his class of employees in the future. 966 F.2d at 619. The plaintiff then retired under the standard provisions of GM's early retirement program in reliance upon those misrepresentations. *Id.* After the

plaintiff's retirement, GM contradicted itself and offered the special, better early retirement program anyway. *Id.* The plaintiff sued for the enhanced retirement benefits offered after his retirement, stating that but for the misrepresentations, he would not have retired. *Id.* The Eleventh Circuit held that the plaintiff lacked standing to sue under ERISA because his "common law fraud claim" did not exist under ERISA and the court refused to create a federal common law claim. *Id.* at 621-22.

In *Stanton,* the Fourth Circuit reached the same result. There, the plaintiff had asked his employer whether it was planning to adopt a better early retirement program in the near future, and in reliance on the employer's statements that it was not, the plaintiff retired. 792 F.2d at 433. However, after the plaintiff's retirement under the earlier plan, the employer adopted a better plan. *Id.* The plaintiff sued for breach of fiduciary duty under ERISA based on the employer's alleged misrepresentations, and argued that he had standing to sue because "he 'may [have] become eligible to receive a benefit' *but for* his leaving Gulf Oil's employ by electing early retirement." *Id.* at 434 (alteration in original). The Fourth Circuit rejected the plaintiff's argument, stating that "[t]he effect of reading in a 'but for' test is to impose participant status on every single employee who *but for* some future contingency may become eligible. Neither caselaw nor other provision of ERISA supports such a reading of 'participant.'" *Id.* at 435.

3. Do Plaintiffs Have ERISA Standing in the Instant Case?

In the instant case, because no party disputes that Plaintiffs are "former employees," we may only find they have standing to sue under ERISA if they have either a "reasonable expectation of returning to covered employment" or "a colorable claim for vested benefits." *Firestone,* 489 U.S. at 117-18; *Alexander,* 990 F.2d at 539. Plaintiffs do not assert any statutory or contractual right to reinstatement, nor do they even request reinstatement. Thus, they do not have a "reasonable expectation" of returning to such employment. *See Alexander,* 990 F.2d at 539.

Nor have Plaintiffs asserted a "colorable claim to vested benefits," as they do not claim that they are entitled to benefits under the terms of their plan as it existed at the time of their retirement. Rather, they claim that they should receive damages for the loss of the additional benefits under the later package (e.g., the $15,000 lump sum and the year of service) because they *would have been* participants under that package but for Defendant's misrepresentations. This echoes the plaintiff's argument that we rejected in *Mitchell:*

> [Mr. Mitchell] did not claim that Mobil had improperly withheld vested benefits. . . . Instead, he claimed that Mobil's violation of ERISA entitled him to additional benefits which he would have received had Mobil's amendments to the Plan not compelled him to retire at fifty-six, rather than sixty. Since these benefits had not yet vested, Mr. Mitchell could not have a colorable claim to

> vested benefits, but *only a claim for compensatory damages*.

896 F.2d at 474 (emphasis added).

The terms of the later October package explicitly excluded Plaintiffs, and they do not argue that they have a colorable claim for those benefits. *Cf. Alexander,* 990 F.2d at 539. Plaintiffs are simply not claiming that, at the time of their suit, they were eligible or likely to become eligible for the additional benefits *under the terms of any welfare or pension plan. See* 29 U.S.C. § 1132(a) (ERISA § 502(a)); 29 U.S.C. § 1002(1)-(3). The nature of their claim is not that Defendants improperly withheld vested benefits owed to them, but rather that they should receive damages for the fraud they suffered. As the Eleventh Circuit has held, ERISA provides no cause of action to non-participants who claim they were defrauded out of pension benefits in violation of common law fraud principles. *See Sanson,* 966 F.2d at 621. Because Plaintiffs are not entitled to the additional benefits at issue "under the terms of [their] plain," their state law claims do not fall within the scope of ERISA § 502(a)(1), and our subject matter jurisdiction cannot be based upon the doctrine of complete preemption.

It is true that our opinion leaves open the uncomfortable possibility that Plaintiffs may lack standing to sue under ERISA, but will then be preempted in state court under § 514 from asserting a state claim, leaving them with no remedy. Although this is a valid concern, we have not found it to be a concern of the federal judiciary. "[W]e have noted the unavailability of a remedy under ERISA is not germane

to preemption analysis." *Cannon v. Group Health Serv. of Okla., Inc.,* 77 F.3d 1270, 1274 (10th Cir. 1996). As we explained in *Raymond,* "[T]he fact that a state law claim may be preempted does not necessarily mandate that there be an ERISA remedy." 983 F.2d at 1538; *see also Corcoran v. United HealthCare, Inc.,* 965 F.2d 1321, 1333 (5th Cir. 1992) ("While we are not unmindful of the fact that our interpretation of the pre-emption clause leaves a gap in remedies within a statute intended to protect participants in employee benefits plans, the lack of an ERISA remedy does not affect a preemption analysis.") (citations omitted). Congress intended the civil enforcement mechanisms of ERISA to be exclusive, and the "policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants . . . were free to obtain remedies under state law that Congress rejected in ERISA." *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 54 (1987); *see also Millsap v. McDonnell Douglas Corp.,* 368 F.3d 1246, 1250 (10th Cir. 2004).

We also point out that the policy gap here is smaller than it may first appear, as it is possible that some plaintiffs may be able to bring claims under other subsections of § 502 that are not at issue in the instant case.[15] For example, there may be the possibility of claims, under proper factual circumstances, under § 510 of ERISA, *see Garratt v. Walker,* 164 F.3d 1249, 1255-56 (10th Cir. 1998) (*en banc*), or breach of fiduciary duty claims brought on behalf of the plan under § 502(a)(2), *see Walter v. Int'l Assn. of Machinists Pension Fund,*

15. We mention the following only as possibilities, without addressing, of course, the elements of such causes of action because these issues are not before us.

949 F.2d 310, 316-17 (10th Cir. 1991), or claims for equitable relief brought under the catch-all provision of § 502(a)(3), *see Varity Corp. v. Howe,* 516 U.S. 489, 507-15 (1996).[16]

In conclusion, we refuse to second-guess Congress' policy choices in ERISA, and we hold that Plaintiffs are not "participants" so as to bring their fraud claims within the reach of § 502(a)(1). We thus hold that the district court erred in finding complete preemption. Upon remand, the state court will be free to consider dismissal under § 514's conflict preemption provision, but that issue is not properly before us.

II. Were Plaintiffs' fraud claims properly removed on the basis of "complete preemption" under the LMRA?

Defendant also argues that Plaintiffs' state law claims of fraud are completely preempted by § 301 of the Labor Management Relations Act ("LMRA"), codified at 29 U.S.C. § 185(a).[17] ERISA is not the only statute that has been found

16. No party in the instant case argues that Plaintiffs' fraud claims should be characterized as breach of fiduciary duty claims, nor are Plaintiffs' allegations in their complaint properly so construed. A claim for fraud requires different elements than does a claim for breach of fiduciary duty, and in any event, Plaintiffs do not request equitable relief as required by a § 502(a)(3) claim. *See Millsap,* 368 F.3d at 1260. We note that at least one court has held that § 502(a)(3) is not available under *Varity* where § 502(a)(1) provides an available remedy, even if the particular plaintiffs end up lacking standing as "participants" under § 502(a)(1). *See Coyne & Delany Co. v. Blue Cross & Blue Shield of Va., Inc.,* 102 F.3d 712, 716 (4th Cir. 1996).

17. Although Defendant raised this alternative argument below, the district court declined to rule on it and relied solely on ERISA

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by the Supreme Court to have "complete preemption" effect. As discussed earlier, § 301 of the LMRA was the first statute to have been so analyzed by the Court. *See Avco,* 390 U.S. at 561; *Taylor,* 481 U.S. at 63-64. Section 301 of the LMRA[18] "governs claims founded directly on rights created by collective-bargaining agreements [CBAs], and also claims substantially dependent on analysis of a collective-bargaining agreement," *see Caterpillar,* 482 U.S. at 394 (quotations omitted), although it does not contain an explicit preemption provision. *See Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 208 (1985).

We have explained that § 301 "preempts questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, . . . whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort." *Cisneros v. ABC Rail Corp.,* 217 F.3d 1299, 1302 (10th Cir. 2000) (alteration in original; quotations omitted). The Supreme Court found no complete preemption under § 301 where the plaintiff's complaint was "not substantially dependent upon interpretation of the [CBA]. . . .

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preemption. We address this argument because we may affirm on any basis supported by the record. *See United States v. Welch,* 327 F.3d 1081, 1089 (10th Cir. 2003).

18. Section 301 of the LMRA states that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a) (2000).

[and did] not rely upon the [CBA] indirectly." *Caterpillar,* 482 U.S. at 395; *see also Allis-Chalmers,* 471 U.S. at 213 (stating that § 301 preemption analysis turns on whether the tort action confers rights on employers or employees "independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract").

The Supreme Court has outlined a key distinction between a claim that involves interpretation of CBA terms and one that involves mere reference to those terms, with only the former requiring complete preemption under § 301 of the LMRA. When the parties do not dispute the meaning of the contract terms, "the bare fact that a[CBA] will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Livadas v. Bradshaw,* 512 U.S. 107, 124, (1994). "[T]he mere need to 'look to' the [CBA] for damages computation is no reason to hold the state-law claim defeated by § 301." *Id.* at 125; *see also Foy v. Pratt & Whitney Group,* 127 F.3d 229, 233 (2d Cir.1997) (emphasizing difference between interpretation of CBA and mere consultation of CBA).

Defendant in the instant case argues that Plaintiffs' fraud claims are simply an attempt to vindicate their rights under the February 19 Memorandum of Agreement ("MOA") (modifying existing CBA), which set forth their early retirement benefits package. However, Plaintiffs do not assert any violation of contractual rights under any labor agreement, but rather sue to vindicate their right not to be defrauded.

They are thus asserting rights independent of the contract and are not preempted by § 301.

Plaintiffs' claims are very similar to those asserted by the plaintiff in *Wynn v. AC Rochester,* 273 F.3d 153 (2d Cir. 2001) (per curiam). In *Wynn,* the plaintiff was not completely preempted by § 301 of the LMRA because "[h]is claim [was] not that GM did not provide what the CBA required, but that GM officials misled him into selecting one option by misrepresenting the availability of the other." *Id.* at 159. Another analogous case was also decided by the Second Circuit in *Foy,* where the plaintiffs alleged that their employer made false promises regarding transfer opportunities prior to lay-offs, and the court found no removal jurisdiction under § 301 of the LMRA. 127 F.3d at 234-35. "State law – not the CBA – is the source of the rights asserted by plaintiffs: the right to be free of economic harm caused by misrepresentation." *Id.* at 235. Similarly, Plaintiffs in the instant case are asserting rights independent of their labor agreements with Defendant.

Defendant also argues that Plaintiffs' fraud claims will require us to interpret the CBA (through the February 19 MOA, which modified the CBA). Defendant correctly points out that Oklahoma law requires as an element of fraud "reasonable reliance" on misrepresentations, and that "an action for fraud may not be predicated on false statements when the allegedly defrauded party could have ascertained the truth with reasonable diligence." *Silver v. Slusher,* 770 P.2d 878, 882 n. 8 (Okla. 1988). Defendant insists that because Plaintiffs allege misrepresentations regarding the MOA and CBA, we will have to interpret those contracts in

order to ascertain whether Defendant's representations were actually false.

However, Defendant misunderstands the nature of Plaintiffs' claims. Plaintiffs do not allege that Defendant made any misrepresentations about the terms or application of the MOA or CBA. Rather, they allege that Defendant lied in informing them regarding the *choice* between retiring under the June plan or waiting until later. Therefore, there is simply no need to interpret the MOA or CBA in order to ascertain whether Defendant's representations were false, and the actual meaning of the CBA and MOA is not in dispute.[19] Just as in *Foy,* Plaintiffs' state law misrepresentation claims "depend upon the employer's behavior, motivation, and statements, as well as plaintiffs' conduct, their understanding of the alleged offer made to them, and their reliance on it. Reference to the CBA may be needed, but state law will play no part in determining what the parties agreed to in the CBA. . . ." 127 F.3d at 235 (citation omitted).

The parties agree that the later October package provides for an additional $15,000 and benefits for an additional year of service. Especially when the terms are undisputed, the court's limited reference to the CBA to confirm damages is not sufficient to remove a state law claim on the ground that

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19. At oral argument, Defendant's counsel raised the hypothetical possibility of the CBA containing language allowing future better packages, which would cut against any reasonable reliance by Plaintiffs on Defendant's misrepresentations to the contrary. However, because no party argues that such language exists in this case, we refuse to find complete preemption on the basis of hypothetical CBA language.

it is completely preempted by § 301 of the LMRA. *See Livadas*, 512 U.S. at 125.

We conclude that Plaintiffs' state law claims are not completely preempted by the LMRA.[20]

III. Were Plaintiffs' fraud claims properly removed on the basis of "complete preemption" under the NLRA?

Finally, Defendant argues for the first time on appeal that the district court had removal jurisdiction based on "*Garmon* preemption" under §§ 7-8 of the National Labor Relations Act ("NLRA"), since Plaintiffs' allegations arguably constitute unfair labor practices prohibited or protected by those sections of the NLRA. Although Defendant did not present this argument to the district court, we may affirm on any basis supported by the record. *See Welch*, 327 F.3d at 1089. We ultimately disagree with Defendant because *Garmon* preemption does not provide a basis for removal jurisdiction.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Supreme Court divested the states of the power to make laws over activities that are arguably protected or prohibited by the NLRA. *Id.* at 244. "*Garmon* preemption"

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20. Defendant also raises the issue of another potential claim by Plaintiffs against their union (IBEW) for breach of the duty of fair representation, and argues that this would also be completely preempted by the LMRA. As Plaintiffs point out, they have not made such a claim, and the union is not a defendant in this case. Accordingly, we ignore this hypothetical cause of action.

applies when the "controversy presented to the state court is identical to . . . that which could have been, but was not, presented to the Labor Board." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* 436 U.S. 180, 197 (1978). In *International Longshoremen's Association v. Davis,* 476 U.S. 380 (1986), the Court held that "*Garmon* preemption is a nonwaivable foreclosure of the state court's very jurisdiction to adjudicate." *Id.* at 389, 398-99. It is a reflection of Congress's decision to vest "exclusive jurisdiction" in the NLRB. *Id.* at 391. If *Garmon* preemption applies, the correct result is that neither the federal court nor the state court has jurisdiction; the case must be adjudicated before the NLRB. *See Baker v. IBP, Inc.,* 357 F.3d 685, 688 (7th Cir. 2004) ("Applied to claims in federal court, and arising under federal law, *Garmon* has nothing to do with either preemption or subject-matter jurisdiction. It is a rule of primary jurisdiction, allocating to an administrative agency the first crack at certain matters."). Accordingly, *Garmon* preemption provides no basis for removal jurisdiction in federal court. A case falling within the scope of the doctrine must be adjudicated before the NLRB.

The lower courts are uniform in finding that *Garmon* preemption under the NLRA does not completely preempt state laws so as to provide removal jurisdiction. *See, e.g., Ethridge v. Harbor House Rest.,* 861 F.2d 1389, 1399-1400 (9th Cir. 1988) (holding that *Garmon* preemption does not constitute "complete preemption" for removal purposes because §§ 7 and 8 of the NLRA do not create jurisdiction in the federal district courts, instead, those provisions vest jurisdiction in the NLRB to determine unfair labor practices and state courts are as able to determine if jurisdiction belongs

in the NLRB as are the federal district courts); *Suarez v. Gallo Wine Distribs. LLC,* No. 02 Civ. 4273 LTSTHK, 2003 WL 716548, at * 2 (S.D.N.Y. Mar. 3, 2003) ("Lower courts that have considered this question have uniformly held that an assertion of *Garmon* preemption is insufficient to provide a basis for removal.") (citing *TKO Fleet Enters. v. Dist. 15,* 72 F. Supp. 2d 83, 87 (E.D.N.Y. 1999) (collecting cases)); *Sandoval v. N.M. Tech. Group LLC,* 174 F. Supp. 2d 1224, 1234 (D.N.M. 2001); *Gul v. Pamrapo Sav. Bank,* 64 F. Supp. 2d 370, 373 (D.N.J. 1999); *Baldwin v. Pirelli Armstrong Tire Corp.,* 927 F. Supp. 1046, 1052 (M.D.Tenn. 1996). *But see Baker,* 357 F.3d at 688 (providing dicta suggesting to the contrary).

The rejection of *Garmon* preemption as a basis for removal is consistent with the Supreme Court's dicta in *Caterpillar,* which stated, "The fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted under the NLRA [pursuant to *Garmon*] does not establish that they are removable to federal court." *Caterpillar,* 482 U.S. at 398. "[R]espondents' state-law claims might be pre-empted by the NLRA, but they would not be transformed into claims arising under federal law." *Id.* at 398 n. 12.

Additionally, we have stated, "In cases in which preemption under the NLRA does not automatically deprive both state and federal courts of jurisdiction in favor of the jurisdiction of the NLRB [under *Garmon*], such [NLRA conflict] preemption is simply a defense to state law claims touching on areas covered by the federal enactment." *United Ass'n. of Journeymen and Apprentices of the Plumbing & Pipe Fitting Indus., Local No. 57 v. Bechtel Power Corp.,*

834 F.2d 884, 887 (10th Cir. 1988). We continued by explaining that this defense provides "no basis for removal of the instant case to the federal court," and that the defendant's claims of preemption under NLRA §§ 7-8 "[were] matters to be addressed in the first instance by the Utah state courts." *Id.* at 887, 890.

Defendant provides no argument as to why we should find that NLRA preemption permits removal to federal court. It will be up to the state court to analyze whether *Garmon* preemption applies.

CONCLUSION

For the foregoing reasons, we REVERSE and REMAND with instructions to remand this case to the state court.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA DATED AND FILED MARCH 17, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-02-289-L

AARON FELIX, SR., *et al.*,

Plaintiffs,

LUCENT TECHNOLOGIES, INC.,

Defendant.

ORDER

Plaintiffs, former employees of defendant Lucent Technologies, Inc. (defendant or "Lucent"), at the Oklahoma City Works ("OKCW"), originally brought this action in state court, alleging fraud and seeking: (1) damages suffered by each plaintiff in a lost "special one-time pension benefit" in the amount of $15,000; (2) damages suffered by those plaintiffs who lost an additional year of service when they were induced to retire effective June 30, 2001; and (3) punitive damages. (Fourth Amended Petition ("FAP") filed February 12, 2002).

Plaintiffs allege that at some point before June 30, 2001, defendant decided to sell off its manufacturing facilities including OKCW and, in an effort to make it more attractive to potential purchasers or merging companies, "Lucent

determined to reduce the number of long-term senior employees at the OKCW." FAP, ¶4. Plaintiffs allege that on February 19, 2001, Lucent entered into a Memorandum of Agreement with the International Brotherhood of Electrical Workers ("IBEW") System Council EM-3 whereby OKCW employees that were retirement-eligible would retire in exchange for receipt of a payment equivalent to 110% of the amount of termination allowance to which the employee would be entitled if the employee was laid off for lack of work up to a maximum of 32 years' service (under the applicable IBEW collective bargaining agreements) plus a "special pension benefit" in the amount of $11,000 which represented the amount to which the employee was otherwise entitled under a pending National Labor Relations Board award against Lucent. According to plaintiffs, these payments were to be made out of the over-funded portion of the Lucent (originally AT&T) pension plan funded by the employees at the OKCW. Additionally, plaintiffs allege that for those OKCW employees that were not then retirement-eligible, Lucent proposed to provide a transitional leave of absence by adding 5 years to the age and/or service to make the employee pension-eligible and to reduce to the extent possible any pension discount for early retirement. Acceptance of Lucent's offer had to be made by May 29, 2001, and an employee accepting the offer would leave the OKGW roll on June 30, 2001. FAP, ¶5.

Plaintiffs allege that, upon reliance on the representations made by Lucent, they accepted the offer, retired, and left the OKCW roll on June 30, 2001. FAP, ¶9. Plaintiffs allege that subsequent to their retirement, Lucent entered into an agreement with Celestica, Inc., a Canadian corporation involved

in the manufacture of computer and telecommunications equipment, whereby Celestica, Inc. was to act as a contract manufacturer and take over the operation of the OKCW and hire as its employees certain remaining OKCW Lucent employees on November 30, 2001. FAP, ¶10. Plaintiffs claim that, contrary to the representations made by Lucent, on October 1, 2001, Lucent agreed to pay those employees still on the OKCW roll benefits identical to those paid to plaintiffs, plus an additional payment of a "special one-time pension benefit" by Lucent of $15,000. FAP, ¶11.

Lucent timely removed the case to this court pursuant to 28 U.S.C. § 1441(b), claiming that plaintiffs' claims arise under the laws of the United States, specifically the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and the Employment Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.* Lucent asserts that plaintiffs' claims are completely preempted by federal law.

This matter is before the court on plaintiffs' Motion for Remand [Doc. No. 13]. Lucent has responded to the motion and plaintiffs were allowed to file a reply brief in support of removal. Plaintiffs maintain that their fraud claim is not preempted and that this case should be remanded to state court. However, because the court determines that plaintiffs' fraud claim is preempted by ERISA, the motion for remand should be denied and the case dismissed.

Under ERISA, claims brought under state law are preempted insofar as they "relate to" any employee benefit plan. 29 U.S.C. § 1144(a). The Tenth Circuit has followed the Supreme Court in reading the preemption clause broadly.

Settles v. Golden Rule Ins. Co., 927 F.2d 505, 509 (10th Cir. 1991). Under the standard applied in this circuit, "common law tort and breach of contract claims are preempted by ERISA if the factual basis of the cause of action involves an employee benefit plan." *Id.* A review of plaintiffs' state court petition reveals that the fraud claim relates to Lucent's alleged denial of additional employee benefits in the form of the "special one-time pension benefit" and the reinstatement of an additional year of service for some employees for purposes of calculating the amount of the respective pension over the life of each pension. Plaintiffs' attempt to label these items as merely "damages" completely overlooks the fact that these items clearly relate to and are derived from Lucent's employee benefit plan. This conclusion is supported by the Tenth Circuit's similar reasoning in the case of *Barrick v. OG&E*, 62 F.3d 1428 (Table), 1995 WL 465809 (10th Cir. 1995) (unpublished opinion cited for its persuasive value pursuant to Tenth Circuit Rule 36.3). In *Barrick*, the court noted that the plaintiffs' state law breach of contract claim clearly related to an employee benefit plan, stating:

> Essentially, the Plaintiffs assert that, but for OG&E's failure to inform them of a planned workforce reduction, they would not have retired and so been able to participate in the amended benefits plan put into effect shortly after their retirement. Indeed, the existence of the plan is at the very heart of Plaintiffs' claim. Therefore, Plaintiffs' common law breach of contract claim is preempted by 29 U.S.C. § 1144(a).

Id. at *2, citations omitted.

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Just as the plaintiffs' common law breach of contract claim was found to be preempted in *Barrick*, the court finds that the plaintiffs' tort claim is likewise preempted by ERISA since the factual basis of plaintiffs' claim involves an employee benefit plan. *Settles*, 927 F.2d at 509. Plaintiffs do not argue that in the event their state law fraud claim is preempted they have a cause of action under ERISA. Indeed, plaintiffs recognize that Lucent's arguments support both removal and dismissal of their claims. In light of the court's preemption ruling, the only claim alleged by plaintiffs fails to state a claim upon which relief can be granted Accordingly, dismissal of the complaint is appropriate. The court need not address Lucent's alternative preemption defense.

In summary, **plaintiffs' Motion for Remand [Doc. No. 13] is DENIED; the Fourth Amended Petition, originally filed in state court, should be and is hereby DISMISSED.**

It is so ordered this 17th day of March, 2003.

s/ Tim Leonard
TIM LEONARD
United States District Judge

APPENDIX C — FOURTH AMENDED PETITION FILED FEBRUARY 12, 2002

IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CJ-2002-190

Aaron Felix, Sr., *et al.*,

Plaintiffs,

vs.

Lucent Technologies, Inc., a corporation,

Defendant.

FOURTH AMENDED PETITION

Plaintiffs for their cause of action against defendant states:

1. Lucent Technologies, Inc. ("Lucent") is a Delaware Corporation with its principal offices in Murray Hill, New Jersey, and at all times relevant to this claim owned and operated a manufacturing facility at 7725 West Reno, Oklahoma City, Oklahoma, known as the Oklahoma City Works ("OKCW"). Defendant has not yet answered. Plaintiffs have previously amended their petition to either correct misspellings or improper party names or to add additional plaintiffs.

2. Each named plaintiff was an employee of Lucent at the OKCW until June 30, 2001.

3. Lucent had originally been created as a division of AT&T Corporation (AT&T) and then had been spun off of AT&T as a free-standing company which owned and operated AT&T's former manufacturing facilities, including OKCW, and Bell Laboratories.

4. Because of a series of substantial financial reversals Lucent determined to sell off its manufacturing facilities including OKCW. It communicated to its workforce at OKCW its intent to restructure and engaged in a series of highly-publicized attempts to sell it manufacturing plants or merge with other similar companies. In an effort to make it more attractive to purchasers/merging companies Lucent determined to reduce the number of long-term senior employees at the OKCW.

5. On February 19, 2001, Lucent entered into a Memorandum of Agreement with the International Brotherhood of Electrical Workers ("IBEW") System Council EM-3 whereby OKCW employees that were retirement-eligible would retire in exchange for receipt of a payment equivalent to 110% of the amount of termination allowance to which the employee would be entitled if the employee was laid-off for lack of work up to maximum of 32 years' service (under the applicable IBEW collective bargaining agreements) plus a "special pension benefit" in the amount of $11,000 which represented the amount to which the employee was otherwise entitled under a pending National Labor Relations Board award against Lucent. These payments were to be made out of the over-funded portion of the Lucent (originally AT&T) pension plan funded by the employees at the OKCW. Additionally, for those OKCW employees that

were not then retirement eligible, Lucent proposed to provide a transitional leave of absence by adding 5 years to the age and/or service to make the employee pension-eligible and to reduce to the extent possible any pension discount for early retirement, Acceptance of Lucent's offer had to be made by May 29, 2001, end an employee accepting the offer would leave the OKCW roll on June 30, 2001.

6. Written material was distributed to the employees at the OKCW and meetings were held with Lucent representatives at which these benefits were outlined. Based upon information communicated to its officers and representatives by Lucent, the IBEW locals at the OKCW also provided information to the employees.

7. At each meeting attended by each individual plaintiff, it was stated by Lucent's authorized representatives that the offer being made by Lucent was a one-time, non-negotiable, final offer that as a take-it-or-leave-it proposal and that any delay by any employee in accepting the offer would not result in any additional benefit. To the contrary, it was emphasized at such meetings that failure to accept Lucent's offer was risking the benefits being offered since Lucent might file bankruptcy of merge with another company.

8. In a newsletter distributed by IBEW Local 2021 on March 15, 2001, the union President stated:

> For those of you who feel there may be even more offered if you wait, I assure you there will not be any additional incentives for retirement.

9. In reliance upon the representations made by Lucent (and reiterated by union officials) that the offer being made was a take-it-or-leave-it, etc. offer and that delaying retirement not only would not gain the employee additional benefits, but instead might jeopardize all of these benefits, over 1,000 eligible employees, including all of the plaintiffs herein, timely accepted the offer, retired, and left the OKCW roll on June 30, 2001.

10. Subsequently, Lucent entered into an agreement with Celestica, Inc., a Canadian corporation involved in the manufacture of computer and telecommunications equipment whereby Celestica, Inc. was to act as a contract manufacturer and take over the operation of the OKCW and hire as its employees certain remaining OKCW Lucent employees on November 30, 2001.

11. Contrary to the representations made by Lucent, on October 1, 2001, Lucent agreed to pay retirement-eligible (and those made eligible by the 5+5 transitional offer) employees still on the OKCW roll benefits identical to those paid to the plaintiffs plus as additional payment of a "special one-time pensions benefit" by Lucent of $15,000.

FIRST CLAIM-FRAUD

12. Plaintiffs reallege each allegation contained in paragraphs 1 through 11 as if fully stated herein.

13. Lucent intentionally misrepresented to each plaintiff the nature of the offer as described in paragraph 7 above with the intent to induce each plaintiff to rely upon such

misrepresentations and to change their respective positions to their detriment. Rather than a "one-time offer", Lucent knew at the time such misrepresentations were made that additional "sweeteners" would be made to reduce the number of senior employees in the OKCW workforce.

14. Each plaintiff did rely upon such misrepresentations in making the decision to retire on June 30, 2001. No plaintiff had the opportunity or ability to discover the truth concerning such misrepresentations. As a result of such fraud, each plaintiff suffered damages in the amount of $15,000.

15. Additionally, a significant number of plaintiffs with a short time to their respective anniversary dates lost an additional year of service by accepting the June 30th retirement date. Each lost year was worth as much as $4,000 in the special pension payment plus a reduction in the amount of the respective pension over the life of each pension.

SECOND CLAIM-PUNITIVE DAMAGES

16. Plaintiffs reallege paragraphs 1 through 15 as if fully stated herein.

17. The fraudulent conduct in which Lucent intentionally engaged constitutes malice and a reckless disregard for the rights of the plaintiffs and is sufficient to justify the imposition of punitive damages in an amount in excess of the amount of actual damages to which plaintiffs are entitled.

Appendix C

WHEREFORE, plaintiffs pray judgment against the defendant Lucent Technologies, Inc., for:

1. damages suffered by each plaintiff in a lost "special one-time pension benefit"in the amount of $15,000; and

2. damages suffered by those plaintiffs who lost an additional year of service when they were induced to retire effective June 30, 2001; and

3. punitive damages in an amount which both punishes the defendant and makes it an example to other similarly-situated companies; and

4. such other and further relief to which the plaintiffs might be entitled.

s/ James A. Ikard
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Attorney for Plaintiffs

APPENDIX D — MEMORANDUM OF AGREEMENT DATED FEBRUARY 19, 2001

MEMORANDUM OF AGREEMENT

Between

Lucent Technologies Inc.

and

The IBEW System Council EM-3

February 19, 2001

This Memorandum is entered into by and between Lucent Technologies Inc. (on behalf of itself and its proposed spin-off company (Agere Systems, Inc.) that will be formed from Lucent's Microelectronics Division), [hereinafter collectively referred to as "Lucent" or "the Company"] and the International Brotherhood of Electrical Workers System Council EM-3 on behalf of Local Unions 21, 1522, 1560, 1599, 1612, 1898, 2000, 2020, and 2021 [hereinafter referred to as " the IBEW" or "the Union"]. The commitments, understandings and agreements by and between the parties are:

1. This Memorandum of Agreement, and any supplements or attachments hereto, hereinafter referred to collectively as "Agreement," shall be binding on the parties hereto. It is further agreed that the new microelectronics company (Agere Systems, Inc.) and any other "spin-off" of Lucent or the new microelectronics company shall be bound by the 1998 National Memorandum of Understanding and the applicable local collective bargaining

agreements by and between Lucent and the Union throughout their term.

2. The Union shall formally execute the 1998 National Memorandum of Understanding by and between the parties, and each appropriate constituent Local Union shall execute the applicable collective bargaining agreements; provided, however, the parties agree that all such applicable collective bargaining agreements shall be modified to incorporate the additional agreements and understandings set forth in this Memorandum of Agreement.

3. This Agreement sets forth the understandings reached as to the following:

   A. the treatment to be afforded eligible employees in a production and maintenance and/or salaried bargaining unit represented by the Union when a decision by the Company to subcontract or, outsource work performed by bargaining unit employees, or work that is or has been traditionally performed by bargaining unit employees, directly results in the layoff, termination or separation of employees in the bargaining unit.

   B. a notification and information sharing process that shall apply with respect to the subcontracting or outsourcing of any production or salaried work performed by bargaining unit employees, or work

that is, or has been traditionally performed by such bargaining unit employees.

C. a notification and information sharing process that shall apply with respect to the sale of a business or the spin off of a business which directly results in the layoff, involuntary termination or involuntary separation of employees in the bargaining unit.

D. The parties agree that a "Sale of the Business" shall not be construed as subcontracting or outsourcing for the purpose of triggering the benefits set forth in subparagraphs 5(a) through (g) herein; provided, however, the Company's Columbus, Oklahoma City and Agere facilities shall be handled separately as provided in the side letters dealing with those facilities.

It is further understood by the parties that a "spinoff" by the Company shall not be construed as subcontracting or outsourcing within the meaning of this Memorandum of Agreement provided the "spinoff" company is fully bound and obligated by all provisions set forth in the applicable collective bargaining agreements) between the Company and the Union, as modified by this Memorandum of Agreement."

4. A new provision shall be added to the applicable collective bargaining agreement(s) titled "Application of LCTOP (or applicable successor plan) in the Event of

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Subcontracting or Outsourcing Directly Resulting in Surplus Conditions." The provision shall read:

> "In the event the Company decides to subcontract or outsource any work performed by production and maintenance and/or salaried bargaining unit employees, or work that is, or has been traditionally performed by production and maintenance and/or salaried bargaining unit employees and such decision directly causes a surplus condition resulting in a layoff of employees with a term of employment of two or more years within the affected bargaining unit, the Company shall, to the extent necessary to relieve the surplus, offer to eligible employees in the affected universe the full range of options provided for under the parties' LCTOP Agreement. It is further agreed that, in the event the provision set forth herein is triggered, the $30,500 limit set forth in paragraphs (2)(d) Optional Termination Pay in the Lucent Career Transition Option Program, and 3(b), Extended Compensation Option, of the 1998 National Memorandum shall be increased to $40,000. The Company may, in its discretion, extend the application of this paragraph beyond the normal surplus universe.
>
> It is understood and agreed by the parties that employees who elect to receive benefits described under this provision shall not be eligible for recall, termination allowances under the collective bargaining agreement or benefits otherwise

provided by application of the provision titled "Treatment of Employees Directly Impacted by the Company's Decision to Subcontract or Outsource Bargaining Unit Work – Application of Certain Employee Benefit Plans and Programs."

5. A new provision shall be added to the applicable collective bargaining agreement(s) titled "Treatment of Employees Directly Impacted by the Company's Decision to Subcontract or Outsource Bargaining Unit Work – Application of Certain Employee Benefit Plans and Programs." The provision shall read:

"In the event the Company decides to subcontract or outsource bargaining unit work or to accomplish such subcontracting or outsourcing through any form of business transaction, including but not limited to lease arrangements or similar transactions, that effectively constitute subcontracting or outsourcing, each employee who is laid off, involuntarily terminated or involuntarily separated from the Company as a direct result of a decision by the Company to subcontract or outsource, and who has a term of employment of two (2) or more years (hereinafter "Affected Employees"), shall, in addition to any other rights or benefits set forth in the collective bargaining agreement (unless specifically stated to the contrary herein), receive the benefits set forth *in this* Paragraph 5.

"Affected Employees" include employees at the affected facilities with a term of employment of

two (2) or more years who are on an approved leave of absence, disability benefits or accident/ worker's compensation benefits on the date their employment would have ended had they been actively employed if and when they present themselves for employment at or before the end of the approved leave, or are certified as fit to return to work under the applicable plan and present themselves for employment, as applicable.

(a) **Five Year Enhanced Transition Leave of Absence Under the Lucent Technologies Inc. Pension Plan.** The Pension Plan shall be amended to provide that Affected Employees who, as of the day their employment with the Company ends, have not met the eligibility requirements for a service pension and are within five (5) years of the age and/or service requirement for attaining service pension eligibility, shall, on the day their employment with the Company ends, be eligible for an enhanced eligibility provision (the "Enhanced TLA"). Under the Enhanced TLA, such employees will be credited with up to five (5) years of age and/or service, to the extent necessary to obtain service pension eligibility. Such credit shall be extended as of the Affected Employee's off-roll date and the pension benefit may be commenced immediately. The additional

age and service credit will not be counted for the purposes of computing the employee's pension. The additional age and service credit will be counted and applied for purposes of reducing the discount for early retirement for all Affected Employees. It is the intent of the parties that the addition of five (5) years of age and/or service may be used by an Affected Employee not only to attain eligibility for a service pension as set forth above, but to reduce, to the maximum extent possible by adding five (5) years of age and/or service, any discount for early retirement that may have otherwise applied to such Affected Employee.

Neither the Company nor the applicable pension plan may reduce or eliminate an Affected Employee's entitlements to the rights set forth in Paragraph 5 (a).

(b) **Expanded and Enhanced Social Security Supplement.** The Pension Plan shall be amended to extend a Social Security supplement to the Affected Employees who are service pension eligible when their employment with the Company ends (including those who are service pension eligible as a result of the Enhanced TLA), and whose service

pension is subject to a discount for early retirement. The amount of the Social Security supplement shall equal the amount of the reduction in the employee's monthly pension annuity payment because of retirement prior to age 55. Social Security supplement payments will continue until the first to occur of the attainment of age 62 or death of the retired employee. All other provisions of the existing Social Security supplement provided under the Pension Plan apply.

(c) **Special Pension Benefit.** The Pension Plan shall be amended to provide a special pension benefit ("SPB") for the Affected Employees in addition to any other accrued benefit. The SPB also applies to Affected Employees who have not yet reached age 21, even though they are not otherwise eligible to participate in the Pension Plan. The amount of the SPB shall be equal to a percentage of Eligible Annual Pay, computed in accordance with the Schedule of SPB Benefits below. The Affected Employee's service will be determined at the time the employee is no longer employed by the Company. Eligible Annual Pay shall be determined as of the first of the month in which the off-roll date occurs, unless

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Lucent elects a date one month earlier to facilitate the faster payment of the SPB. Eligible Annual Pay shall be determined in accordance with the description below.

With respect to Affected Employees who are service pension eligible (after application of the Enhanced TLA), or whose entire benefit under the Pension Plan is otherwise immediately distributable, the SPB shall be available in the form of a lump sum or in any other form of benefit so long as such other form is the same form selected for the immediately distributable benefit under the Pension Plan. With respect to other Affected Employees, the SPB shall be available in the form of a lump sum, a single life annuity or a joint and 50% surviving spouse annuity. In all cases, the form of benefit shall be subject to the normal spousal consent requirements of the Pension Plan. The SPB may be commenced, at the election of the employee, at any time beginning as soon as administratively practicable after employment with the Company ends, and until distribution is required to commence. However, if the present value of the SPB and all other accrued benefits under the Pension Plan (determined in

accordance with Internal Revenue Code Section 417(e)) does not exceed the amount (currently $5,000) permitted to be distributed without consent under Internal Revenue Code Section 411(a)(11), or any successor provision, such present value shall be distributed in a lump sum.

If distribution of the SPB is deferred, the amount of the SPB shall bear interest equal to the average yield on 10-year Treasury bills for August of the preceding calendar year, determined in accordance with IRS guidelines. Interest shall be credited at the end of each plan year except that in the case of a distribution during the year, interest shall be credited through the end of the month preceding the annuity starting date.

For purposes of the SPB, Eligible Annual Pay shall be equal to an employee's annualized weekly rate of pay, based on his or her Adjusted Rate plus applicable Night Work and 7-Day Coverage Bonuses in effect as of the date specified for the calculation of the affected Employee's SPB with a minimum, for other than a part-time employee, equal to four (4) of the employee's Scheduled Daily Tours per week. In no event shall

the SPB for any Affected Employees be less than 110% of the termination allowance that the Affected Employees would have been eligible for under the applicable collective bargaining agreement if laid off.

When an employee's Standard Rate has been reduced and the effective date of such reduction falls within the twenty-six (26) week period preceding the date specified for the calculation of the affected employee's SPB, the Standard Rate used shall be that in effect immediately preceding the reduction from the highest standard rate which was effective within such twenty-six (26) week period, if it is higher than the Standard Rate in effect as of the date specified for the calculation of the affected Employee's SPB. Any decrease in an employee's Standard Rate immediately following a temporary increase which was in effect for a period not to exceed eight (8) weeks shall not be considered a "reduction" when applying this paragraph.

Neither the Company nor the applicable pension plan may reduce or eliminate the SPB of an Affected Employee.

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Any term not defined in this Memorandum of Agreement shall have the meaning set forth in Article 3 of the applicable collective bargaining agreements dated as of May 31, 1998 between the Company and the Union.

It is understood that employees who receive the treatment described in this subparagraph 5(c) are not eligible for recall, termination allowances under the collective bargaining agreement, or any provisions of the Lucent Career Transition Option Program. Duplicate payments of the SPB and termination allowance are not intended or permitted.

The parties also agree that nothing in this Agreement or in this provision is intended to deprive an otherwise eligible employee of termination allowance that is otherwise payable under the collective bargaining agreement in circumstances where this Agreement does not apply.

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Special Pension Benefit (SPB) Schedule of Benefits

Completed Years of Service	*SPB % of Eligible Annual Pay Equivalent to 110% of Termination Allowance The Employee Would A Have Been Eligible for if Laid Off*
2	4.23%
3	6.35%
4	8.46%
5	10.58%
6	12.69%
7	14.81%
8	19.04%
9	23.27%
10	27.50%
11	31.73%
12	35.96%
13	40.19%
14	44.42%
15	50.77%
16	59.23%
17	67.69%
18	76.15%
19	84.62%
20	95.19%
21	105.77%
22	116.35%
23	126.92%

24	137.50%
25	148.08%
26	158.65%
27	169.23%
28	179.81%
29	190.38%
30	200.96%
31	211.54%
32 or more	220.00%

(d) **Special One-Time Lump Sum Transition Payment.** All Affected Employees with a term of employment of at least two (2) years as of the day their employment with the Company ends will be entitled to a special one-time lump sum transition payment in the amount of $14,000, subject to applicable taxes (including payroll taxes) and tax withholding. Such payment is not part of the Employee's standard rate of pay or basic wages for any purpose, nor is it included in the computation of any payments or benefits under any pension or benefits plan, fringe benefit, allowance or differential. Such payment will be made as soon as administratively practicable after employment with the Company ends. The parties agree that such payment will normally be paid within 30 days of the employee's date of

termination but in no event later than 60 days of such termination date.

Before making a decision to subcontract or outsource bargaining unit work at a manufacturing location(s), the Company may amend the Pension Plan to provide an enhanced pension benefit for Affected Employees at such manufacturing location(s), in addition to any other accrued benefit (including the Special Pension Benefit). Such enhanced pension benefit shall be payable, at the election of the Affected Employee, in a lump sum with an immediate present value equal to $11,000, and shall be subject to terms and conditions otherwise identical to the Special Pension Benefit described under Paragraph 5(c) above. An Affected Employee who receives such enhanced pension benefit shall not be eligible to receive the special one-time lump sum transition payment, as described in the first subparagraph of this Paragraph 5(d).

(e) **Extended Benefit Coverage for Affected Employees.** The Company's retiree medical, dental and life insurance plans shall be amended to the extent necessary to provide that an Affected Employee who becomes eligible for a

service pension under the enhanced TLA will also become immediately eligible for retiree medical, dental and life insurance benefits. In addition:

(1) An Affected Employee who is not service pension eligible, who is offered employment by the company to which Lucent is subcontracting or outsourcing and who accepts such offer within 30 days and commences employment on the date designated by the new employer shall be eligible to receive a one-time payment in an amount equal to the employee's monthly premium under the other company's medical, dental and vision plans (on a family basis) at the time such employment commences multiplied by 12. Such payment shall be made as soon as administratively practicable after transfer of employment and shall be subject to applicable taxes, including payroll taxes, and tax withholding.

(2) An Affected Employee who is not eligible for a service pension, who refuses an offer of employment by the company to which Lucent is subcontracting or outsourcing, and

the job being offered is in the same metropolitan area as the Lucent facility at which he or she was employed, shall be eligible to the same medical, dental, vision and other insurance benefits otherwise available to employees whose employment ends as a result of a layoff.

(3) An Affected Employee who is not eligible for a service pension and either (A) is not offered employment by the company to which Lucent is subcontracting or outsourcing or (B) refuses an offer of employment by the company to which Lucent is subcontracting or outsourcing and the job being offered is outside the same metropolitan area as the Lucent facility at which he or she was employed, shall be entitled to continued company paid medical, dental and vision plan coverage for 12 months on the same basis as if actively employed. An additional six months of COBRA coverage will be available upon the employee' election.

(4) Other benefit plans described below shall be available to an Affected Employee described in (3) immediately above, as follows:

- Basic Life Insurance and Accidental Death and Dismemberment coverage shall be available for all Affected Employees for six months on the same basis as if actively employed.

- Supplemental Life Insurance and Supplemental Accidental Death and Dismemberment coverage shall be available for six months at the expense of the Affected Employee (at active employee rates).

- Dependent Life and Dependent Accidental Loss coverage shall be available for 90 days at the expense of the Affected Employee (at active employee rates).

(f) **Enhanced FAED Reimbursement Allowance.** With respect to Affected Employees, Section 5 of the description of the Lucent Career Transition Option Program in the 1998 MOU entitled "Involuntary Termination Due to Layoff," shall be amended to provide for

an eligibility of up to $5,000 (rather than $2,500) in funds for certain education, training, out-placement and relocation expenses. All other provisions of such section apply.

(g) **Long-Term Savings and Security Plan.** Under the Long Term Savings and Security Plan (the "LTSSP"), the account balances of all Affected Employees shall be fully vested as of the date their employment with the Company ends.

The Company and the Union acknowledge that, under current law, the subcontracting or outsourcing arrangement may not constitute a distribution event permitting distribution of the LTSSP account balances of those Affected Employees who are employed by a new company. As a result such account balances may continue to be held in the LTSSP. The Company agrees that such Affected Employees shall have access to in-service withdrawals and loans as if they remained employed by the Company, except that loan payments must be made by coupon payments rather than payroll deduction. If the Company determines that the law has changed so as to permit distribution of the LTSSP account balances, the Company shall

take such steps as are necessary to permit Affected Employees to elect a distribution, unless such account balance does not exceed the amount (currently $5,000) permitted to be distributed without consent under the Internal Revenue Code Section 411(a)(11), or any successor provision, in which event such account balances shall be distributed in a lump sum.

(h) Issues that relate to the administration of the Plans through which the benefits described in this Paragraph 5 (except for subparagraph 5(f)) are made available shall be subject to the claims and appeals process provided under each applicable Plan.

6. A new provision shall be added to the collective bargaining agreement entitled "Successor Clause." The provision shall read:

"In the event the Company engages in negotiations for the sale of a Company business in which employees covered by this Agreement are employed, the Company shall make a good faith effort to have any purchaser of the Company business be bound by the provisions set forth in the applicable collective bargaining agreement(s) (including this Agreement) as a condition of the sale. The parties agree, however, that the Company

(or any spinoff thereof) shall not be required to be successful in such good faith efforts and that the Union shall have no right, under this paragraph, to require that any such sale of the Company business include a provision relating to the adoption of this Agreement as a condition of such sale except to the extent required by law."

7. A new provision shall be added to the applicable collective bargaining agreements titled "Subcontracting and Outsourcing of Production or Salaried Graded Work – Notification to Union." The provision shall read:

> **"Subcontracting and Outsourcing of Production or Salaried Graded Work – Notification to the Union.** The Company shall not subcontract or outsource any production or salaried graded work performed by the bargaining unit employees, or work that is, or has been, traditionally performed by bargaining unit employees, unless all of the following conditions have been satisfied.
>
> (1) Prior to any decision to subcontract or outsource bargaining unit work, the Company will provide the Union with written notice that it intends to consider the use of subcontracting and outsourcing. This notification by the Company will be given at an early stage of its consideration of any potential subcontracting or outsourcing but

substantially before any final decision is made to subcontract or outsource bargaining unit work. The purpose of this notice will be to engage the Union in meaningful discussion concerning the possibility of such subcontracting or outsourcing, and to examine any proposals by the Union that will maintain the work and job security of bargaining unit members. The parties recognize that in a competitive environment the Company must have the ability to make timely decisions consistent with the overall interests of the business, including the employment security of on-roll Company employees.

(2) The Company will share all information that is relevant to the subcontracting or outsourcing of production or salaried graded work. In addition, the Company agrees to meet with the Union on a regular basis to engage in dialogue prior to making a final decision to subcontract or outsource the production or salaried graded work.

(3) No final decision by the Company to subcontract or outsource any production or salaried graded work performed by bargaining unit employees, or work that is, or has been, traditionally performed

by bargaining unit employees, shall be made until after the Union has been notified in writing of the Company's decision or, in any event, prior to the Company's compliance with the provisions of subparagraphs (1) and (2).

(4) The notification, commitment to dialogue and exchange of information provisions set forth in subparagraphs (1) through (3) above shall be in addition to, and not in limitation of, the responsibility and obligation of the Company under the parties' Workplace of the Future Agreement (or its applicable successor agreement) and any other relevant provisions set forth in the collective bargaining agreement related to subcontracting or outsourcing of production work or salaried graded work. The commitments set forth in subparagraphs (1), (2) and (3) do not alter or otherwise modify the provisions in the collective bargaining agreement relating to subcontracting or outsourcing of work performed by Trades personnel.

(5) The provisions of these subparagraphs (1) through (4) shall not be subject to the Grievance Procedure and the National Grievance Step outlined in Article 6, and will not be subject to the provisions of

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Article 7 (Arbitration) of the applicable collective bargaining agreement. Instead, when alleged violations of this "Notification to the Union" procedure occur, the dispute resolution process set forth below will apply:

(a) The Union may file a grievance directly with the bargaining agent who shall have five (5) days to discuss and resolve the grievance. Should the grievance not be resolved within five (5) days, the Union may request, in writing, that the grievance be submitted to a neutral third party, selected from a list of neutrals previously agreed upon by the parties.

(b) The parties shall schedule a hearing with the neutral third party within ten (10) days of the Union's request. At the hearing with the neutral third party, the Union shall present its case concerning why the "Notification to the Union" procedures set forth in this provision were violated, and the Company shall present its case in defense. In order to expedite the hearing and decisional process, no transcript of the hearing shall be required. Each party may be represented by legal counsel. Post-hearing briefs shall not be

permitted. Each party shall present its entire case at the hearing.

(c) The neutral third party shall issue a written decision within ten (10) days of the hearing. The written decision will settle the grievance at issue, but will no constitute a precedent in any other case. No written opinion will be prepared unless specifically requested by both parties, in which case such opinion will follow within thirty (30) days thereafter.

(d) The parties agree that the issue to be determined by the neutral third party under this special resolution process is limited to whether the Company violated the "Notification to the Union" provisions set forth in this provision. The neutral third party shall not, under this process, be empowered to determine issues relating to whether the Company has a right to subcontract or outsource bargaining unit work. Any issues that arise between the parties relating to whether the Company has a right to subcontract or outsource bargaining unit work are reserved for resolution through the traditional grievance process set forth in the agreement under Articles 6 and 7, it being understood that each party is permitted

to raise an appropriate claims or defenses, including arbitrability. This limitation on the authority of the neutral third party under this special procedure shall not, however, limit the neutral third party, in any manner, from imposing any reasonable or traditional remedy, as part of his/her award, against the Company, in the event a violation of this Article is found to have occurred. Such remedies may include, but not be limited to, an order that all subcontracting or outsourcing at issue be stopped until the Company has complied with the provisions set forth in this article. Any back pay award shall be limited to a period not to exceed one hundred and twenty (120) days.

8. **Continuation of "Consultant Arrangement" by and between the Company and the International Brotherhood of Electrical Workers.** The parties agree that the terms, provisions and commitments set forth in the attached transaction letter by and between the Company and the International Brotherhood of Electrical Workers are incorporated herein by reference. The letter is titled "Sale of a Business or Spin-off of a Business – Notification to the Union."

9. **Employment Opportunities for Bargaining Unit Employees at Columbus Works and Oklahoma City Works.** Because of special circumstances relating to employees in

the bargaining units at the Columbus Works and the Oklahoma City Works, the parties agree that the commitment(s) set forth in the attached letter shall apply.

10. The Union agrees to request in writing the immediate withdrawal of the unfair labor practice charges, Case Nos. 6-CA-30583 (formerly 4-CA-28196) and 6-CA-31076 (formerly 4-CA-28858), pending with the National Labor Relations Board. The Union further agrees that this Agreement will not be effective until the National Labor Relations Board notifies the parties that the above-referenced charges are dismissed. The Union agrees it shall not file any further unfair labor practice charge c the Union's interests as a result of the pendency of the NLRB case and that such grievances shall be construed, under this Memorandum of Agreement, as resolved. The parties also understand that some local grievances may be pending that pre-date or are distinguishable from the underlying circumstances relating to the NLRB case and this commitment is not intended to affect the pendency or viability of such grievances.

11. The parties agree that this Memorandum of Agreement will supplement the existing 1998 National Memorandum of Understanding between the parries, as well as the applicable local collective bargaining agreements, the terms of which shall remain in full force and effect, as supplemented by the provisions set forth herein.

Subject to the National Labor Relations Board's dismissal of the unfair labor practice charges referenced in paragraph 10 above, and subject to approval of this Agreement by the IBEW System Council EM-3, the understandings

set forth herein shall become effective as the date of the execution of this Agreement. Except as modified herein, the existing terms and conditions of the 1998 National Memorandum of Understanding and the applicable collective bargaining agreement shall remain in full force and effect in accordance with their original terms.

This Memorandum of Agreement is agreed to this 19th day of February, 2001.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

s/ Stephen T. Lynn
STEPHEN T. LYNN
President
System Council EM-3, IBEW

s/ Michael D. Quinlan
MICHAEL D. QUINLAN
International Representative
IBEW

LUCENT TECHNOLOGIES INC.

s/ Louis D. Hudson
LOUIS D. HUDSON
Vice President – Work Force Relations
Lucent Technologies Inc.

APPENDIX E — AMENDMENT OF THE LUCENT TECHNOLOGIES INC. PENSION PLAN DATED DECEMBER 20, 2001

Action of The Senior Vice President
Human Resources
Pursuant To Delegations Of The
Lucent Technologies Inc. Board Of Directors
Dated October 5, 1998, August 24, 2000,
June 7, 2001 and December 18, 2001

Amendment of the
LUCENT TECHNOLOGIES INC. PENSION PLAN

Issue: Lucent Technologies Inc. (the "Company") wishes to amend the Lucent Technologies Inc. Pension Plan (the "Pension Plan") to provide the programs and benefits set forth in paragraphs 1 through 9 as follows:

1. A voluntary retirement program as described in Appendix E to the Pension Plan, substantially as set forth in the attached Appendix E. Such amendment is intended to be made for the benefit of eligible non-represented participants of the Pension Plan who elect to retire during the period June 11, 2001 through the Window Close Date as defined in Appendix E and whose election to retire is accepted by the Company. Participants who participate in the 2001 voluntary retirement program shall have an additional five years of age and/or five years of service added to their Term of Employment.

2. A Supplemental Pension Benefit as described in Appendix F to the Pension Plan substantially as set forth in the attached Appendix F. Such amendment is intended to be made for the benefit of Affected Participants pursuant to a Memorandum

of Understanding between the Company and the International Brotherhood of Electrical Workers System Council EM-3 on behalf of Local Unions 21, 1522, 1560, 1599, 1612, 1898, 2000, 2020, and 2021, dated February 19, 2001 (the "MOU"), in which certain Participants affected by "subcontracting or outsourcing" as defined in the MOU shall be entitled to the additional pension benefits set forth in the attached Appendix F. An Affected Participant is a Participant who (a) is covered by a collective bargaining agreement with the International Brotherhood of Electrical Workers System Council EM-3 on behalf of Local Unions 21, 1522, 1560, 1599, 1612, 1898, 2000, 2020, and 2021; (b) has completed a Term of Employment of two (2) or more years; (c) is employed at the Columbus, Ohio or Oklahoma City, Oklahoma facility; and (d) whose employment with the Company is being terminated on account of "subcontracting or outsourcing" as defined in the MOU. Affected Participants shall be entitled to an Enhanced Transition Leave of Absence, an Enhanced Social Security Supplement, a Special Pension Benefit and an enhanced pension benefit equal to a lump sum with an immediate present value equal to $11,000.

3. A Supplemental Pension Benefit as described in Appendix G to the Pension Plan substantially as set forth in the attached Appendix G. Such amendment is intended to be made for the benefit of Affected Participants pursuant to a Letter of Agreement between the Company and the System Council EM-3, International Brotherhood of Electrical Workers, dated September 24, 2001 (the "Letter of Agreement"), under which certain EM-3 represented employees shall be entitled to the additional pension benefits set forth in the attached Appendix G. An Affected Participant for purposes of Appendix G is an

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Employee (a) who is covered by a collective bargaining agreement with the System Council EM-3 in the Columbus, Ohio or Oklahoma City, Oklahoma facilities; and (b) whose employment with the Company is terminated, other than as a voluntary quit or for cause, during the period starting September 1, 2001 and ending November 30, 2001. Affected Participants shall be entitled to a special, one time enhanced pension benefit equal to a lump sum with an immediate present value equal to $15,000.

4. A Supplemental Pension Benefit as described in Appendix H to the Pension Plan substantially as set forth in the attached Appendix H. Such amendment is intended to be made for the benefit of Affected Participants pursuant to a Memorandum of Agreement between the Company and the Communication Workers of America dated April 19, 2001 (the "MOA"), in which certain Participants affected (the "Affected Participants") by "subcontracting or outsourcing" as defined in the MOA shall be entitled to the additional pension benefits set forth in the attached Appendix H. An Affected Participant is a Participant who (a) is covered by a collective bargaining agreement with the Communication Workers of America ("CWA") in the production and maintenance and/or Five Tier bargaining units represented by the CWA at the Atlanta Works and Sturbridge facilities; (b) has completed a Term of Employment of two (2) or more years; and (c) whose employment with the Company is being terminated on account of "subcontracting or outsourcing" as defined in the MOA. Affected Participants shall be entitled to an Enhanced Transition Leave of Absence, an Enhanced Social Security Supplement, and a Special Pension Benefit.

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5. A Supplemental Pension Benefit as described in Appendix I to the Pension Plan substantially as set forth in the attached Appendix I. Such amendment is intended to be made for the benefit of Affected Participants pursuant to a Memorandum of Agreement between the Company and the Communication Workers of America ("CWA") dated April 19, 2001 (the "MOA"), in which certain Participants affected (the "Affected Participants") by "subcontracting or outsourcing" as defined in the MOA shall be entitled to the additional pension benefits set forth in the attached Appendix I. An Affected Participant is a Participant who (a) is covered by a collective bargaining agreement with the CWA; (b) has completed a Term of Employment of two (2) or more years; and (c) is employed at the Merrimack Valley Works and whose employment with the Company is being involuntarily terminated (for other than disciplinary reasons) between April 2, 2001 and the completion of the business transaction referred to as Tranche 3. Affected Participants shall be entitled to an Enhanced Transition Leave of Absence, an Enhanced Social Security Supplement, a Special Pension Benefit and an enhanced pension benefit equal to a lump sum with an immediate present value equal to $3,400.

6. A Special Voluntary Pension Program as described in Appendix J to the Pension Plan substantially as set forth in the attached Appendix J. Such amendment is intended to be made for the benefit of eligible participants pursuant to a Memorandum of Understanding between the Company and the Communication Workers of America ("CWA") on behalf of all Employees in the service and support jobs group and hourly rated jobs group in Phoenix, Arizona employed under the CWA Repair, Distribution, Service and Support No. 2

Contract, dated September 1, 2001 (the "MOU"), in which any SVPP Eligible Participant whose election to retire in connection with the 2001 Special Voluntary Pension Program ("2001 SVPP") is made on or before a date specified by the Company and is accepted by the Company. SVPP Eligible Participants are Participants whose age and years of service total seventy-five or more as of October 27, 2001 and who are on the roll for the period September 26, 2001 through October 27, 2001. SVPP Eligible Participants shall be entitled to a special, one-time enhanced pension benefit equal to a lump sum with an immediate present value equal to $40,000.

7. A Special Voluntary Pension Program as described in Appendix K to the Pension Plan substantially as set forth in the attached Appendix K. Such amendment is intended to be made for the benefit of eligible participants pursuant to a Memorandum of Understanding between the Company and the Communication Workers of America ("CWA") on behalf of all Employees in all job titles employed under the Installation Contract CWA-22, dated September 1, 2001 (the "MOU"), in which any SVPP Eligible Participant whose election to retire in connection with the 2001 Special Voluntary Pension Program ("2001 SVPP") is made on or before a date specified by the Company and is accepted by the Company. SVPP Eligible Participants are Participants whose age and years of service total seventy-five or more as of October 18, 2001, and who are on the roll for the period September 18, 2001 through October 18, 2001. SVPP Participants will be entitled to a special one-time enhanced pension benefit equal to a lump sum with an immediate present value equal to $40,000.

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8. A supplemental pension benefit as described in Appendix L to the Pension Plan, substantially as set forth in the attached Appendix L. Such amendment is intended to be made for the benefit of eligible non-represented participants in the Pension Plan who are covered by a declaration made under the Lucent Force Management Guidelines after February 14, 2001 and before July 1, 2002. Affected participants will be entitled to a supplemental pension benefit equal to a lump sum with an immediate present value based on the formula set forth in Appendix L.

9. A lump sum payment option for CWA represented Employees who terminate employment on or after June 1, 2001 and LBAs who terminate employment on or after May 31, 2001, who are eligible for a deferred vested pension substantially as set forth in the attached Amendment to the Pension Plan. Such amendment is intended to be made for the benefit of eligible Employees who (a) have a vested accrued benefit with a present value in excess of $5,000 and (b) are eligible for a deferred vested pension under Section 4.1(b) of the Pension Plan.

Background: On August 24, 2000, June 7, 2001 and December 19, 2001 the Board of Directors of the Company delegated to the undersigned the authority to make the amendments to the Pension Plan described herein, if such amendments did not increase the present value of benefits payable under such Plan by stated amounts. The amendments set forth herein do not increase the present value of benefits payable by more than such amounts.

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Action: Pursuant to the Delegations approved by the Board of Directors of the Company on October 5, 1998, August 24, 2000, June 7, 2001 and December 19, 2001, the Pension Plan is hereby amended to add Appendices E through K and an amendment effective June 1, 2001 thereto in substantially the form attached hereto. The foregoing amendments to the Pension Plan shall be subject to such changes, including retroactive changes, as may be necessary to obtain an Internal Revenue Service determination that the Pension Plan and its associated trust continue to be qualified and tax exempt, respectively, under the Internal Revenue Code of 1986, as intended and to such other changes as may be necessary to comply with applicable law.

Signature s/ Pamela O. Kimmet
Pamela O. Kimmet
Senior Vice President, Human Resources

Date: December 20th, 2001

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APPENDIX F

SUPPLEMENTAL PENSION BENEFITS FOR CERTAIN IBEW PARTICIPANTS AFFECTED BY SUBCONTRACTING/OUTSOURCING

1. Pursuant to a Memorandum of Understanding between the Company and the International Brotherhood of Electrical Workers System Council EM-3 on behalf of Local Unions 21, 1522, 1560, 1599, 1612, 1898, 2000, 2020, and 2021, dated February 19, 2001 (the "MOU"), certain Participants affected by "subcontracting or outsourcing" as defined in the MOU shall be entitled to the additional pension benefits set forth in this Appendix F.

2. An Affected Participant is a Participant who (a) is covered by a collective bargaining agreement with the International Brotherhood of Electrical Workers System Council EM-3 on behalf of Local Unions 21, 1522, 1560, 1599, 1612, 1898, 2000, 2020, and 2021; (b) has completed a Term of Employment of two (2) or more years; (c) is employed at the Columbus, Ohio, Oklahoma City, Oklahoma, or Princeton, New Jersey facility; and (d) whose employment with the Company is being terminated on account of "subcontracting or outsourcing" as defined in the MOU. For purposes of subsection 2(b), Affected Participants include Participants with a Term of Employment of two (2) years who are on an approved leave of absence, disability benefits or accident/worker's compensation benefits on the date their employment would have ended

had they been actively employed, if and when they present themselves for employment at or before the end of the approved leave, or are certified as fit to return to work under the applicable plan and present themselves for employment, as applicable.

3. Affected Participants shall be entitled to the Enhanced Transition Leave of Absence, Enhanced Social Security Supplement, Special Pension Benefit, and Special One-Time Transition Payment described below:

(a) Five Year Enhanced Transition Leave of Absence.

Affected Participants who are not service pension eligible pursuant to Section 4.1(A) as of the day their employment with the Company ends, and are within five (5) years of the age and/or service requirement for attaining service pension eligibility, shall, on the day their employment with the Company ends, be eligible for an enhanced eligibility provision (the "Enhanced TLA"). Under the Enhanced TLA, such employees will be credited with up to five (5) years of age and/or service, to the extent necessary to obtain service pension eligibility. Such credit shall be extended as of the Affected Participant's off-roll date and the pension benefit may be commenced immediately. The additional age and service credit will not be counted for purposes of computing the Affected Participant's basic monthly pension benefit under Section 4.2(C), but will be applied, to the maximum extent possible, by adding five

(5) years of age and/or service, for purposes of reducing the discount for early retirement that may have otherwise applied to such Affected Participant under Section 4.2(M).

(b) Enhanced Social Security Supplement.

Affected Participants who are service pension eligible when their employment with the Company ends (including those who are service pension eligible as a result of the Enhanced TLA above), and whose service pensions are subject to a discount for early retirement shall receive an Enhanced Social Security Supplement. The amount of the Enhanced Social Security Supplement shall equal the amount of the reduction in the Affected Participant's monthly pension annuity payment because of retirement prior to age 55. Enhanced Social Security Supplement payments will continue until the earlier of the Affected Participant's attainment of age 62 or death. The Enhanced Social Security Supplement in all other respects will be subject to the provisions of Section 4.2(n) of the LTPP.

(c) Special Pension Benefit.

Affected Participants shah also be entitled to a special pension benefit ("SPB"). The amount of the SPB shall be equal to a percentage of Eligible Annual Pay, computed in accordance with the Schedule of SPB Benefits below. The Affected Participant's Years of Service for this purpose will be determined at the

time the Employee is no longer employed by the Company. Eligible Annual Pay shall be determined as of the first of the month preceding the month in which the off-roll date occurs.

(i) For purposes of determining the SPB, Eligible Annual Pay shall equal an Employee's annualized weekly rate of pay, based on his or her Adjusted Rate plus applicable Night Work and 7-Day Coverage Bonuses in effect as of the date specified for the calculation of the Affected Participant's SPB with a minimum, (for other than a part-time employee), equal to four (4) of the Employee's Scheduled Daily Tours per week.

When an Affected Participant's Standard Rate has been reduced and the effective date of such reduction falls within the twenty-six (26) week period preceding the date specified for the calculation of the Affected Participant's SPB, the Standard Rate used shall be that in effect immediately preceding the reduction from the highest standard rate which was effective within such twenty-six (26) week period, if it is higher than the Standard Rate in effect as of the date specified for the calculation of the Affected Participant's SPB. Any decrease in an Affected Participant's Standard Rate immediately following a temporary increase which was in effect for a period not to exceed eight (8) weeks shall not be considered a "reduction" when applying this paragraph.

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(ii) Special Pension Benefit (SPB) Schedule of Benefits

Completed Years of Service	*SPB* % of *Eligible Annual Pay*
2	4.23%
3	6.35%
4	8.46%
5	10.58%
6	12.69%
7	14.81%
8	19.04%
9	23.27%
10	27.50%
11	31.73%
12	35.96%
13	40.19%
14	44.42%
15	50.77%
16	59.23%
17	67.69%
18	76.15%
19	84.62%
20	95.19%
21	105.77%
22	116.35%
23	126.92%
24	137.50%
25	148.08%
26	158.65%
27	169.34%
28	179.81%
29	190.38%
30	200.96%
31	211.54%
32 or more	220.00%

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(iii) If distribution of the SPB is deferred, *the amount* of the SPB shall increase annually at the end of each Plan Year based on the average yield on 10 year Treasury bills for August of the preceding calendar year. In the event an Affected-Participant elects distribution during the year, such increase shall be credited through the end of the month preceding the Annuity Starting Date.

(d) **Special One-Time Transition Payment (Enhanced Pension Benefit).**

Affected Participants will be entitled to a special one-time enhanced pension benefit equal to a lump sum with an immediate present value equal to $11,000, and shall be subject to terms and conditions otherwise identical to the Special Pension Benefit described under Paragraph 3(c) above.

4. An Affected Participant's accrued benefit derived from Paragraphs 3(c) and 3(d) above shall equal a monthly benefit payable as a single life annuity beginning at age 65 calculated using the Affected Participant's SBP amount and Special One Time Transition Payment and the age 65 deferred annuity factors using the Applicable Interest Rate and the Applicable Mortality Table (as defined in Section 4.1(g) of the LTPP) as of the Affected Participant's Termination Date (the "Enhanced Annuity").

5. With respect to Affected Participants who are service pension eligible (after application of the Enhanced TLA), or whose entire benefit under the LTPP is otherwise immediately distributable, the Enhanced Annuity shall be paid as a QJSA, or in any other form permitted under

Section 4.4(A) of the LTPP so long as such other form is the same form selected for the immediately distributable benefit under the LTPP. With respect to Affected Participants who are entitled to a deferred vested benefit, the Enhanced Annuity shall be paid as a QJSA, or a single life annuity if the Affected Participant has no spouse as of the Affected Participant's Annuity Starting Date.

6. An Affected Participant may elect to commence his or her Enhanced Annuity at any time prior to the Affected Participant's Normal Retirement Date calculated as an actuarially equivalent QJSA or single life annuity. Such Enhanced Annuity shall be based on the deferred annuity factors as of the Affected Participant's Termination Date, deferred to the Participant's Annuity Starting Date determined using the Applicable Interest Rate and the Applicable Mortality Table (as defined in Section 4.1(g) of the LTPP) as of the Affected Participant's Termination Date.

7. In addition to the election described in paragraph 6, an Affected Participant may elect, subject to the Lawful Spouse's written consent, if applicable, to have the present value of the Enhanced Annuity paid as a lump sum. If the Affected Participant elects to have the Enhanced Annuity paid as a lump sum, the Affected Participant shall receive the present value of the Enhanced Annuity determined using the Applicable Interest Rate and the Applicable Mortality Table (as defined in Section 4.1(g) of the LTPP).

8. If an Affected Participant commences his or her Enhanced Annuity at or before the Annuity Starting Date of the remainder of his or her accrued benefit under the LTPP, it

is intended that the annual limit under Code section 415 shall, to the extent practicable, first be applied to the Enhanced Annuity and then to the remaining portion of the Affected Participant's accrued benefit under the LTPP.

9. With respect to Employees who would qualify as an Affected Participant under Section 2 if such Employee had attained age 21 as of his termination of employment, such Employee shall become a participant in the LTPP who is entitled to a fully vested pension benefit which consists solely of the SPB amount set forth in Paragraph 3(c) of this Appendix.

10. If the present value of the Affected Participant's accrued benefit under the LTPP, including the enhancements set forth in Paragraph 3, (determined in accordance with Internal Revenue Code Section 417(e)) does not exceed the limit on benefits (currently $5,000) permitted to be immediately distributed without consent under Internal Revenue Code Section 411(a)(11), or any successor provision, such present value shall be distributed in a lump sum.

11. An Affected Employee shall not be eligible for the layoff bridging rules of Section 7.6 of the Plan with respect to the benefits described in this Appendix F.

12. In all other respects, the provisions of LTPP and the definitions set forth therein shall apply to the interpretation of this Appendix F.

Appendix E

APPENDIX G

ADDITIONAL PENSION ENHANCEMENT FOR CERTAIN IBEW EMPLOYEES AFFECTED BY CELESTICA SUBCONTRACTING/OUTSOURCING

1. Pursuant to a Letter of Agreement between the Company and the System Council EM-3, International Brotherhood of Electrical Workers, dated September 24, 2001 (the "Letter of Agreement"), certain EM-3 represented employees shall be entitled to the additional pension benefits set forth in this Appendix G.

2. An Affected Participant for purposes of this Appendix G is an Employee (a) who is covered by a collective bargaining agreement with the International Brotherhood of Electrical Workers System Council EM-3 in the Columbus, Ohio or Oklahoma City, Oklahoma facilities; and (b) whose employment with the Company is terminated, other than as a voluntary quit or for cause, during the period starting September 1, 2001 and ending November 30, 2001. For purposes of this Appendix G, Affected Participants include Employees described above who do not meet the participation requirements of Section 4.1 (e) of the Plan, who shall be fully vested in the additional pension enhancement described in Section 3 of this Appendix G. Affected Participants include otherwise eligible Employees who are on an approved leave of absence, disability benefits or accident/worker's compensation benefits on the date their employment would have ended had they been actively employed, if and when they

present themselves for employment at or before the end of the approved leave, or are certified as fit to return to work under the applicable plan and present themselves for employment, as applicable.

3. Affected Participants shall be entitled to an additional pension enhancement equal to a lump sum with an immediate present value equal to $15,000, which shall be subject to terms and conditions otherwise identical to the Special Pension Benefit described under Paragraph 3(c) of Appendix F.

4. An Affected Participant's accrued benefit derived from Paragraph 3 above shall equal a monthly benefit payable as a single life annuity beginning at age 65 calculated using the age 65 deferred annuity factors using the Applicable Interest Rate and the Applicable Mortality Table (as defined in Section 4.1(g) of the LTPP) as of the Affected Participant's Termination Date (the "Enhanced Annuity").

5. With respect to Affected Participants who are service pension eligible (after application of the Enhanced TLA), or whose entire benefit under the LTPP is otherwise immediately distributable, the Enhanced Annuity shall be paid as a QJSA, or in any other form permitted under Section 4.4(A) of the LTPP so long as such other form is the same form selected for the immediately distributable benefit under the LTPP. With respect to Affected Participants who are entitled to a deferred vested benefit, the Enhanced Annuity shall be paid as a QJSA, or a single life annuity if the Affected Participant has no spouse as of the Affected Participant's Annuity Starting Date.

Appendix E

6. An Affected Participant may elect to commence his or her Enhanced Annuity at any time prior to the Affected Participant's Normal Retirement Date calculated as an actuarially equivalent QJSA or single life annuity. Such Enhanced Annuity shall be based on the deferred annuity factors as of the Affected Participant's Termination Date, deferred to the Participant's Annuity Starting Date, determined using the Applicable Interest Rate and the Applicable Mortality Table (as defined in Section 4.1(g) of the LTPP) as of the Affected Participant's Termination Date.

7. In addition to the election described in paragraph 6, an Affected Participant may elect, subject to the Lawful Spouse's written consent, if applicable, to have the present value of the Enhanced Annuity paid as a lump sum. If the Affected Participant elects to have the Enhanced Annuity paid as a lump sure, the Affected Participant shall receive the present value of the Enhanced Annuity determined using the Applicable Interest Rate and the Applicable Mortality Table (as defined in Section 4.1(g) of the LTPP).

8. If an Affected Participant commences his or her Enhanced Annuity at or before the Annuity Starting Date of the remainder of his or her accrued benefit under the LTPP, it is intended that the annual limit under Code section 415 shall, to the extent practicable, first be applied to the Enhanced Annuity and then to the remaining portion of the Affected Participant's accrued benefit under the LTPP.

Appendix E

9. If the present value of the Affected Participant's accrued benefit under the LTPP, including the enhancements set forth in Paragraph 3 (determined in accordance with Internal Revenue Code Section 417(e)) does not exceed the limit on benefits (currently $5,000) permitted to be immediately distributed without consent under Internal Revenue Code Section 411(a)(11), or any successor provision, such present value shall be distributed in a lump sum.

10. An Affected Employee shall not be eligible for the layoff bridging rules of Section 7.6 of the Plan with respect to the benefits described in this Appendix G.

11. In all other respects, the provisions of LTPP and the definitions set forth therein shall apply to the interpretation of this Appendix G.

APPENDIX F — LETTER CONFIRMING AGREEMENT TO AMEND LUCENT TECHNOLOGIES, INC. PENSION PLAN DATED SEPTEMBER 24, 2001

September 24, 2001

Stephen T. Lynn
President, Systems Council EM-3
International Brotherhood of Electrical Workers
3013 Kutztown Road
Reading, PA 19605

Michael D. Quinlan
International Representative
International Brotherhood of Electrical Workers
1125 Fifteenth Street NW
Washington, DC 20005

Dear Sirs:

This letter will confirm our agreement to amend the Lucent Technologies Inc. Pension Plan (the "Pension Plan") to provide a one-time pension benefit, payable in a lump sum or an annuity, to those EM-3 represented employees in the Columbus and Oklahoma City facilities whose employment is affected by the transition of these facilities from Lucent to Celestica. The Company has agreed to amend the Pension Plan to provide a one-time lump sum pension payment of $15,000 (or its annuity equivalent) for each EM-3 represented employee who terminates employment at Lucent, during the period starting September 1, 2001 and ending upon the completion of the outsourcing of work from Lucent to Celestica. Any employee who voluntarily quits or is terminated for cause will not be eligible.

Appendix F

It is understood and agreed that the one-time lump sum pension payment described above will apply only to the EM-3 represented employees at the Columbus and Oklahoma City facilities, and does not constitute a modification to either the Lucent-IBEW CBAs or to the February 19, 2001 MOA. It is also agreed that the lump sum payment described in this letter is in addition to the lump sum payment contained in Paragraph 5(d) of the February 19, 2001 MOA, and is not intended to supersede or otherwise supplement that agreement.

Sincerely,

s/ Ralph P. Craviso
Ralph P. Craviso

AGREED: _____
Stephen T. Lynn
President, System Council EM-3
International Brotherhood of Electrical Workers

AGREED: s/ Michael D. Quinlan *9/24/01*
Michael D. Quinlan
International Representative
International Brotherhood of Electrical Workers

APPENDIX G — EXCERPTS FROM BRIEF OF APPELLANTS DATED JULY, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CASE NO. 03-6112

Aaron Felix, Sr., et al.

Plaintiffs/Appellants,

vs.

Lucent Technologies, Inc.,

Defendant/Appellants.

BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE HONORABLE TIM LEONARD (CIV-02-289-L)

Appendix G

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ATTORNEY FOR APPELLANTS

Oral Argument Desired

July 2003

[Table of Contents and Table of Authorities Intentionally Omitted]

* * *

3. *Application of Standards*: Applying these standards applicable to removal, particularly the defendant's burden of establishing the propriety of removal and the that any doubts or ambiguities as the removal require remand, the court should have remanded the case.

The starting point to any such inquiry is the unique facts of this case: on one hand, the use of the pension fund (instead of Lucent's own funds) to pay what were clearly not pension-related obligations and, on the other, the nature of plaintiffs' state claims. This interaction between the true

nature of the transaction and the plaintiffs state claims will be discussed below. Once properly evaluated, the court should have remanded the case to the state court.

* * *

. . . In *Barrick,* [*v. OG&E*, 62 F.3d 1428 Table, 1995 WL 465809 (10th Cir. 1995)] the plaintiffs filed a breach of contract suit in state court, focusing on the loss of "pure" retirement benefits, alleging that the because defendant failed to inform them of a planned reduction in force before they retired, they lost pension benefits-the essence of the pension plan itself, resulting in upholding ERISA preemption. Unlike *Barrick,* the damages sought by the plaintiffs herein (the $15,000 for employees "terminated from Lucent as a result of the transfer of those facilities to Celestica", APP. at 125) was clearly unrelated to pension-except that the pension was the source of the payment.[11]

Unlike both *Settles* and *Barrick*, this case relates to or involves the pension plan solely as the *source* of the payment of non-pension payments.

B. *Additional § 514(a) ERISA Cases.*

As with *Settles* and *Barrick,* the recent case of *Conover v. Aetna Health Care, Inc., supra,* 320 F.3d at 1077, relates

11. As noted earlier, $ 15,000 lump sum payments (labeled a "one-time lump sum pension payment") were made to some employees who, because of their lack of service time, did not even participate in the LTTP. (APP. at 125-127)

to a straight claim for benefits under a plan: after plaintiff was injured in an automobile accident, Aetna, the company that provided long-term disability insurance through her employer, approved her disability benefits. Subsequently, Aetna determined that she could return to work and terminated her benefits. Plaintiff then filed a state court suit alleging intentional breach of contract and bad faith. Aetna removed the case to federal court. A few months later Aetna reviewed additional information and concluded that plaintiff remained eligible, restoring her benefits and paying all back benefits due. This mooted her intentional breach of contract suit, but Aetna sought a declaration that her bad faith claim was preempted by ERISA The court below dismissed her claim as being preempted. On appeal the plaintiff invoked the insurance regulation exemption contained in ERISA. This court reviewed extensive case law and determined that plaintiffs bad faith claim was not entitled to the insurance regulation exemption. *Conover is* the typical ERISA case-she has made a claim under her disability insurance plan and because it was denied, she filed a state tort claim relating to the alleged bad Path administration of the plan.[12]

Similarly, the case *Engelhoff v. Engelhoff,* 532 U.S. 141 (2001), involved a life insurance policy under which the decedent had designated his wife his beneficiary under an ERISA plan. Shortly before he died, he was divorced and his children sued to recover under a Washington state statute which deemed a divorce to have revoked the ex-spouse as beneficiary. The Court invalidated the state statute under ERISA's preemption section-again related to a "true" plan issue.

12. There are simply no cases analogous to the facts of this case and every case cited by defendant below shared a central feature-they all revolve around genuine pension/insurance plan issues.

Appendix G

Below, defendant asserted that the that resolution of plaintiffs' claims "requires reference to and interpretation to the LTTP" (Notice of Removal ¶ 17, APP. at 56) and is thus preempted under ERISA. However, the LTTP was only "tangentially involved" with plaintiffs' claims.

* * *

As for § 502(a) as basis for ERISA preemption of plaintiffs' state common law claims, defendant mischaracterized below the plaintiffs' claim as if plaintiffs were attempting to challenge the structure, administration or interpretation of the plan, when the FAP made it clear plaintiffs were not. As with the cases cited by defendant on § 514(a), defendant relied wholly on "true" ERISA cases. For example, a cited case, *Peters v. The Lincoln Elec. Co.*, 285 F.3d 456 (6th Cir. 2002) involved an employee benefit plan ("SERP") and plaintiffs' entitlement to future participation.

Another cited case, *Engelhardt v. The Paul Revere Life Ins. Co.*, 139 F.3d 1346 (11th Cir. 1998), involved a claim for coverage for a detached retina in a multiemployer trust that provided group disability insurance coverage to the eligible employees of the participating employers and where the policy in question had an exclusion for benefits for disability related to "either or both eyes." Again, the case falls clearly within the "true" ERISA claims cases cited by defendants.

* * * *

APPENDIX H — EXCERPTS FROM REPLY BRIEF OF APPELLANTS DATED SEPTEMBER, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CASE NO. 03-6112

Aaron Felix, Sr., et al.

Plaintiffs/Appellants,

vs.

Lucent Technologies, Inc.,

Defendant/Appellants.

REPLY BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE HONORABLE TIM LEONARD (CIV-02-289-L)

Appendix H

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Oral Argument Desired

September 2003

[Table of Contents and Table of Authorities
Intentionally Omitted]

PROPOSITION I

THE COURT ERRED IN DENYING THE MOTION TO REMAND

Lucent has responded to the claim in Appellants' Brief that the court failed to properly apply the standards governing remand by simply asserting that the court was correct in refusing to remand this case because the court was correct in dismissing the case. Lucent misses the point-it had the burden of establishing the propriety of removal and a presumption existed against removal and doubtful cases must be resolved in favor of remand. (see Br.Aplnt 10-11). For all of the

arguments advanced in its brief, Lucent has not refuted the plaintiffs' claim that the unique facts of this case-on one hand, the use of the pension fund (instead of Lucent's own funds) to pay what were clearly not pension-related obligations and, on the other, the nature of plaintiffs' state claims-render the "vanilla" ERISA cases cited by Lucent unpersuasive. Properly applying this court's remand standards, the court below should have remanded this case.

* * *

PROPOSITION II

TIE COURT ERRED ON DENYING THE MOTION TO REMAND AND IN SUSTAINING THE MOTION TO DISMISS ON THE BASIS OF ERISA PREEMPTION

Lucent again argues that plaintiff's state claims are preempted either under § 514(a) because they "relate to" the Lucent Technologies Pension Plan ("LTTP") or under § 502(a)(1)(B) because plaintiffs seek pension benefits. Lucent attempts to exalt form or substance and to transform clearly non-pension payments into pension solely on the basis that (after it raided the pension fund) the money used to pay its employees came from the LTTP.

However, Lucent's failure to address the unique facts of this case is compounded by the cases it cites in support of dismissal. Not a single case cited by Lucent involves the use of an ERISA plan other than as the source of traditional ERISA benefits. (e.g. disability benefits, retirement, etc.).

Without any authority for its position, Lucent asks the court to apply ERISA preemption to plaintiffs' fraud claim plaintiffs even though they are not seeking "pension" benefits.

* * *

CONCLUSION

The court faces a challenging task-a (currently) unique set of facts "peg" which do not fit neatly in the traditional "hole" of either ERISA or the LMRA cases. The use of the LTTP to fund buy-outs that are undeniably non-pension presents to the court both a dilemma and an opportunity. Can a company dip into an over-funded pension fund to pay an unfair labor practice judgment, and still hide behind ERISA when it lies to its employees to induce them to accept an offer? Can a company dip into an over-funded pension fund to pay termination pay wholly unrelated to pensions when it lies to its employees to induce them to accept the offer and still hide behind ERISA? Can a company dip into an over-funded pension fund to pay termination pay wholly unrelated to pensions and then deny it to the workers it lied to in the first place and still hide behind ERISA or LMRA? The answer to all three questions should be an emphatic No! It would be ironic indeed if the court was to expand ERISA, a law adopted to protect employees' futures from the depridation of unscrupulous employers, to insulate a company that lied to its workers about economic issues unrelated to pensions at all. The court should reverse the court below and remand the case to the District Court of Oklahoma County.

* * * *